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97TH CONGRESS, 2d Session } SENATE { REPORT No. 97-414

SHIPPING ACT OF 1982

MAY 25, 1982.—Ordered to be printed

Mr. PACKWOOD, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1593]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1593) to revise regulation of international liner shipping operating in the United States foreign commerce, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill do pass.

PURPOSE OF THE BILL

The Shipping Act of 1982 revises the Shipping Act, 1916, to provide an updated, simplified, more efficient, responsive, and effective regulatory scheme for international liner shipping. The paramount objective of this regulatory scheme is to develop and maintain an efficient ocean transportation system through commercial means, with minimum government involvement, in order to serve the needs of United States foreign commerce.

The bill seeks more closely to harmonize U.S. shipping practices with those of our major trading partners, especially by reaffirming antitrust immunity for certain carrier and conference activities and by granting antitrust immunity for shippers' councils, subject to surveillance and sanction under a single law enforced by a single federal agency. The primary role of the Federal Maritime Commission (FMC) would be to exercise an oversight regulatory function to protect carriers, shippers, ports, and others from certain unfair or unjustly discriminatory shipping practices.

5263-17

BACKGROUND

The U.S. merchant marine faces serious problems and is now at one of its historic low points in the percentage of cargoes in the U.S. export and import trades that it carries. Though our commercial liner fleet [1] is the strongest element in our merchant marine,[2] it nevertheless warrants immediate remedial attention before its contribution to transportation of our foreign commerce declines too greatly.[3] U.S.-flag carriers are outnumbered by foreign competitors in every trade route in the U.S. foreign commerce. Because our foreign commerce is substantially dependent on regularized service at stable rates,[4] and because we have placed heavy reliance on our general fleet for national defense purposes, the U.S. commercial liner fleet serves as a logical focal point of national shipping policy.

Current governmental support programs have not provided the necessary lift. The administration, therefore, is nearing completion of a comprehensive review of maritime promotional policy. Some of their proposals will undoubtedly be controversial.

In the meantime, however, this Committee believes the time is ripe to revise the principal maritime regulatory statute, the Shipping Act, 1916, in order to end the uncertainty and delay that surrounds government regulation of ocean liner shipping. Delays in the Federal Maritime Commission's approval process sometimes stretch on for years. Conflicting views expressed by various executive branch agencies concerning acceptable conference practices, as well as shifting decisions by the FMC and the courts have created confusion over the responsibilities of the conferences and the government's regulation of conference activities. New approaches to the regulation of concerted activities represent a necessary first step in revitalizing our maritime commerce and these approaches can be implemented now without concern for budgetary impact.

GENESIS OF THE SHIPPING ACT, 1916

In the 2 years immediately prior to World War I, the House Committee on Merchant Marine and Fisheries conducted an in-depth investigation of the liner shipping industry operating in the foreign commerce of the United States.[5] Prompted by alleged abuses of the Sherman Act,[6] their inquiry revealed that the prevailing practice worldwide involved individual carriers cooperating through a conference system. That system has been described as follows:

The conference system, which is essential to achieving these objectives, has been summarized as follows:

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[1] Liner service has been defined as a scheduled operation by a common carrier whose ships operate on a predetermined and fixed itinerary over a given route at relatively regular intervals which are advertised considerably before sailing in order to solicit cargo from the public. In the U.S. international trades liner service is regulated under the Shipping Act, 1916.

[2] Overall, U.S.-flag ships now carry less than 5 percent of our foreign trade, principally due to the almost negligible share carried by U.S.-flag bulk vessels. U.S. liners compare well at about 27 percent, though this is a decline from about 30 percent several years ago and well short of the 40-percent goal many nations now pursue.

[3] The U.S. liner fleet has declined from 645 ships in 1968 to 233 ships at the beginning of 1982. The number of liner companies has declined from 19 in 1970 to 9 today. Though the decrease in number of ships largely represents a managerial decision to replace old, small, inefficient vessels with large, modern container ships, and though the decrease in companies may be attributable to other factors, both of these trends emphasize the fact that the last decade has not seen significant new investment in the U.S.-flag fleet.

[4] In 1979, the cargo value in the U.S. liner trades ($99.7 billion) exceeded the combined value in the nonliner ($52.8 billion) and tanker ($43.3 billion) services.

[5] Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trades, 4 House Committee on Merchant Marine and Fisheries, Proceedings in The Investigation of Shipping Combinations under House Resolution 587, 63d Congress (1913).

[6] Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended.

A shipping conference is a voluntary association of ocean carriers operating on a particular trade route between two or more countries. The purpose of a shipping conference is the self-regulation of price competition, primarily through the establishment of uniform freight rates and terms and conditions of service between the member shipping lines. . . . By operating within an internally regulated conference, carriers seek mutual restraint from the pursuit of sharp business practices and rate tactics that result in unstable economic consequences. . . .

The most often discussed attribute of a conference system is its collective control over rates. Generally, conference members are required by their conference agreements to charge uniform rates established by the vote of the membership. Conferences, however, often provide for "open rates" on specified commodities, which allow individual carriers to negotiate rates with the shippers without consideration of a conference-prescribed rate.

In order to protect their operations from economic attack by nonmembers, and thus to assure their members of a sufficient supply of cargo to sustain their long-term commitment to the particular trade, conferences typically employ shipper loyalty mechanisms, such as dual rate systems, which tie shippers to the services provided by the conference members.[7]

The conference system, they found, had developed in response to the fact that the ocean liner industry is highly capital intensive, leading individual lines to attempt to fill their vessels through intense price competition, which, if not controlled, would result in excessive and destructive competitive practices.

The Committee agreed that the conference system could not operate legally in U.S. trades without express immunity from the application of the antitrust laws of the United States. The U.S. trades, however, were served by many foreign-owned companies as well as U.S. operators, and U.S. imports and exports were also the imports and exports of many foreign nations with fully equal interest in our commerce. In the face of the unusual characteristics of international economic competition, the Alexander Committee concluded that some degree of immunity from the antitrust laws should be granted to liner operators in our foreign commerce. In its report, issued in 1914, the Committee commented:

. . . that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements show that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results; the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and

[7] See, Mason, "The Relationship and Parallel Development or Economic Regulation and Antitrust Enforcement in the Ocean Common Carrier Industry," in "Proceedings: in search of a rational liner shipping policy," a Northwestern University transportation forum, (1978).

conferences are not confined to the lines engaging in foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.[8]

To protect against certain disadvantages and abuses of the conference system, the Committee prescribed effective government regulatory control. As a result, shortly after enacting the Clayton Act,[9] Congress enacted the Shipping Act, 1916, which, with certain modifications, continues in force today.

EROSION OF CARRIER ANTITRUST IMMUNITY

While several provisions of the Shipping Act, 1916, need to be revised and updated, reform of section 15 of the act is crucial to any effort to eliminate the confusion which currently characterizes government regulation of ocean liner shipping.

Section 15 sets forth four grounds upon which an agreement may be disapproved. The FMC may not approve any agreement which it finds to be unjustly discriminatory or unfair, detrimental to the commerce of the United States, contrary to the public interest, or violative of the Act. All other agreements must be approved.

In construing these standards, the Commission has concluded that demonstration that an agreement would violate the antitrust laws absent immunity, alone, is substantial evidence that the agreement is "contrary to the public interest," unless other evidence is produced that detracts from the weight of that factor. This tends to subordinate the transportation factors (which the Alexander Report found to favor concerted liner activities) to antitrust principles. Weighing antitrust principles against countervailing transportation factors is often a complex and time-consuming process; and the uncertainty and delay that result from the structure of the 1916 Act and its interpretations have thus served largely to undermine its objectives.

In many cases, carriers are unable to secure timely approval of agreements for concerted activity and tying arrangements which give conferences their requisite commercial strength and viability (e.g., ratemaking agreements; intermodal arrangements; pooling agreements; joint service ventures; rationalization agreements; discussion agreements; and inter-conference agreements). Even when approval is secured, there remain valid fears of prosecution under the antitrust laws should the parties' conduct subsequently be found to exceed the permissible bounds of the agreement or to be otherwise in violation of the Shipping Act. This has occurred despite congressional intent to treat the foreign waterborne commerce of the United States differently from other commerce and industries subject to the antitrust laws of the United States.[10]

The first challenge to the Commission's primary jurisdiction over liner carrier agreements came in *United States Navigation Co.* v. *Cunard Steamship Co.* (284 U.S. 474 (1932)). In *Cunard* it was alleged that a conference, through the use of exclusive patronage con-

[8] Id footnote 5.
[9] Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended.
[10] See, Fawcett and Nolan; and, "Antitrust and Shipping Regulation in the United States," Report of the Committee on Ocean Liner Conferences, the "Maritime Law Association of the United States (1978)."

tracts with certain shippers, had entered into and engaged in a conspiracy to restrain trade in violation of the Sherman and Clayton Antitrust Acts. The activities complained of had not been submitted to nor approved by the Shipping Board, the predecessor of the present FMC. The Supreme Court, in unanimously affirming two lower courts, declared that:

> In any event, it reasonably cannot be thought that Congress intended to strip the board of its primary original jurisdiction to consider such an agreement and "disapprove, cancel, or modify" it, because of a failure of the contracting parties to file it as § 15 requires. A contention to that effect is clearly out of harmony with the fundamental purposes of the act and specifically with the provision of § 22 authorizing the board to investigate *any* violation of the act upon complaint or upon its own motion and make such order as it deems proper. And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.

Twenty years later, the Supreme Court followed its rationale in *Cunard* in holding that the United States could not enjoin under the antitrust laws conference agreements that had not been submitted to the Federal Maritime Board for approval (*Far East Conference* v. *United States*, 342 U.S. 570 (1952)).

It thus had been clearly settled that (1) antitrust statutes were not paramount where the actions complained of were reachable by remedies provided in the Shipping Act, and (2) remedies for violating section 15 were to be found within the provisions of that act.

What followed, however, was a two-pronged judicial and administrative assault on section 15's antitrust protections which has rendered them largely ineffective.

(*a*) *Loss of Antitrust Exemption*

In *Carnation Co.* v. *Pacific Westbound Conference* (383 U.S. 213 1966)), the Supreme Court distinguished *Cunard* and *Far East Conference*, stating that those cases required the courts to defer to the Commission's primary jurisdiction only in instances where such deference is necessary to avoid conflict betwen the courts and the Commission. The Court stated:

> Although the Commission can approve prospective operations under agreements which have been implemented without approval, respondents concede that the Commission has no power to validate preapproval implementation of such agreements. Therefore, *Far East* and *Cunard* principles only preclude courts from awarding treble damages when the defendant's conduct is arguably lawful under the Shipping Act.[11]

[11] *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222 (1966).

Carnation thus increased antitrust exposure and subjected the regulated shipping industry to potential treble damage liability under the antitrust statutes and reparations liability under the Shipping Act.

The role of the antitrust laws in the regulatory scheme of international ocean shipping was further expanded 2 years later in *Sabre Shipping Corporation* v. *American President Lines*.[12] In *Sabre*, an FMC hearing examiner had found that the rates of the conferences involved had a "predatory" effect on Sabre Line, a non-conference carrier in the trade, and the conferences' rates were therefore "so unreasonably low as to be detrimental to the commerce of the United States" within the meaning of section 18(b)(5) of the Shipping Act. Sabre then sued in federal district court for treble damages under the antitrus tlaws. The district court reasoned that even though the rates of the defendant conferences had been set pursuant to FMC-approved section 15 agreements, the finding of a Shipping Act "violation" operated to retroactively strip the conferences of section 15 antitrust immunity for those "unlawful" activities. Consequently, a treble damage claim would lie.

The dilemma in which conferences find themselves as a result of *Carnation*, *Sabre*, and their legacy has been described as follows:

> On the one hand, conferences are invited and indeed encouraged to act collectively, in ways which, but for section 15, would be contrary to the antitrust laws; they are, on the other hand, in constant danger of retroactive exposure to significant penalties under those antitrust laws, if (a) under *Carnation*, a practice, which all had reason to believe was covered by existing section 15 authority, is at some later date held to be a "new" section 15 agreement, and thereby one requiring separate section 15 approval; or if (b) under *Sabre*, a rate or other practice believed to be proper is held to be violative of any one or more of the Shipping Act's substantive provisions, subsequent to a hearing of some years' duration.[13]

(*b*) *The Svenska Presumptions*

The 1961 amendments to the Shipping Act [14] added a fourth test to section 15, requiring that an agreement be disapproved where it was found to be "contrary to the public interest." While there may be some dispute over what Congress intended "public interest" to mean within the context of section 15, it seems clear that Congress intended to retain the presumption in favor of section 15 agreements, with the burden upon opponents to prove they should not be approved.[15]

Nevertheless, in *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linen* (390 U.S. 238 (1968)), the Supreme Court upheld an FMC decision creating a presumption that a conference restraint which interferes with the policies of antitrust laws is "contrary to the public interest"; the court held that such an agreement will be approved only if the proponents could then demonstrate that the restraint is required by a serious transportation need, necessary to secure important public benefits, or in furtherance of a valid regulatory purpose of the Shipping Act. This presumption elevated anti-

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[12] 285 F. Supp. 949 (S.D.N.Y. 1968), aff'd sub nom. Japan Line, Ltd v. Sabre Shipping Corp., 407 F. 2d 173 (2d Cir.) cert. denied. 395 U.S. 922 (1969).
[13] Fawcett and Nolan, p. 555.
[14] Act of October 3, 1961 (P.L. 87–346; 75 Stat. 763).
[15] See, Fawcett and Nolan, p. 551.

trust principles to a position of new importance in section 15 proceedings.

CONSEQUENCES OF THE EROSION OF CARRIER ANTITRUST IMMUNITY

Though the Shipping Act, 1916, originally was designed to validate the conference system and to insulate it from the antitrust laws of the United States, the combined impact of this two-tiered assault on section 15's antitrust protections for the conference system has rendered those protections largely illusory. Conferences act at their peril in conducting the very activities that the Shipping Act contemplates they will undertake, because the FMC and the courts usually view such activities as anticompetitive combinations which are presumptively contrary to the public interest.

In the Committee's view, the present situation has resulted in such major regulatory problems as:

Delay in the FMC's approval process for Section 15 agreements.

Application of vague standards of approvability for section 15 agreements and subsequent loss of predictability in regulatory decision-making.

Confusion over rates and responsibilities of conferences and conflicting views expressed by various Executive Branch agencies concerning acceptable conference practices.

A "chilling effect" on the efforts of carriers cooperatively to arrive at rational commercial arrangements to improve U.S.-flag participation in our liner trades, increase operational efficiency, and promote comity with our trading partners. These efforts not only face constant risk of opposition from the Antitrust Division of the Department of Justice, but have exposed all parties to prosecution or the threat of prosecution under the U.S. antitrust laws.

NEED

ANTITRUST IMMUNITY

The judicial and administrative reversal of shipping policy has limited the flexibility of the conference system and, not at all incidentally, has annoyed our international trading partners, who do not agree with the theory of our antitrust laws as they relate to international commerce. Though the United States undoubtedly possesses the sovereign authority to enforce her antitrust laws in her international shipping trades, this Committee firmly believes it is in our best interests to harmonize our regulation with international practice. The margins of acceptable conduct have been unclear and the protection of the antitrust immunity granted by the Commission tenuous. The chilling effect, the uncertainties, and the inefficiencies forced by antitrust exposure have plagued carriers of all flags serving our foreign trade.

Clear antitrust immunity also marks a major step in revitalizing our maritime industry because it removes a major handicap created by uneven enforcement. U.S.-flag carriers domiciled in this country are totally exposed to all U.S. laws and regulations pertaining to liner shipping, including the full brunt of unexportable domestic antitrust policies, while foreign carriers generally evade the thrust of those same U.S. laws and regulations. Foreign carrier exposure is limited by the locus of records and documentation overseas, beyond the reach of subpena and FMC section 21 orders, and by "blocking statutes" erected

by the governments of our major trading partners who do not share our antitrust philosophy. These blocking statutes enacted by 12 countries [16] in response to U.S. efforts to enforce its shipping and antitrust laws, prohibit the production of evidence or testimony by witnesses pursuant to subpenas issued by the FMC. The British Government, for example, has recently enacted a law entitled "Protection of Trading Interests Act, 1980." That act provides that the British Secretary of State may direct any person in the United Kingdom not to comply with another country's laws insofar as they attempt to regulate actions outside of the other country to the detriment of British trading interests. It also authorizes the Secretary to prohibit compliance with foreign court orders that encroach upon the jurisdiction of the United Kingdom. The law also prohibits a British court from enforcing certain multiple damage awards (including treble damages) against United Kingdom citizens, and permits them to recover the part of such multiple damage awards which exceeds actual compensation.

To make matters worse, the Justice Department has objected to many pooling, space-charter, joint venture or consortia proposals that include U.S. carriers, but has rarely intervened when such agreements are confined to foreign carriers. Consequently, U.S. carriers have become reluctant even to seek authority to operate by the same efficient methods for which foreign carriers receive frequent approvals from our own government. Exposure to the antitrust laws and the heavy burden of justification before the Commission have deprived U.S.-flag carriers in particular, from potential pricing and cost benefits that could be achieved through the economics of rationalized or joint services. At the same time foreign carriers can make arrangements or concessions to improve their competitive position, often by providing shippers outside of the United States with benefits on routes other than those to or from the United States.

By clearly authorizing rationalizing arrangements with complete antitrust immunity and by eliminating dual enforcement by the Justice Department as well as the Commission, this bill would eliminate much of the unequal affect of our regulation on U.S.-flag operators.

In making its determination to legislatively overturn *Cornation*, *Sabre*, *Svenska*, and their progeny, the Committee also was persuaded by several other commercial factors.

First, "open competition", which can be expected to seriously weaken the conference system, cannot be assured for any length of time. Thus even theoretical benefits associated with such competition would be temporary. Afterwards, the U.S. liner fleet, U.S. exporters and importers, the public, and our national security would pay the price.

Furthermore, conferences and other agreements for economic cooperation are not confined to the lines engaging in the foreign trade of the United States. They are universally used in the foreign trade of other countries as well as in our own. The merchant of other countries now enjoy the foregoing advantages of cooperative arrangements. Making open and cutthroat competition possible among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign counterparts.

Second, in the event of the "price-cutting" envisioned by "open competition", it would not be the efficient low-cost carriers who would survive. There are many state-controlled carriers in international ship-

[16] U.S.S.R., Sweden, Norway, Denmark, Federal Republic of Germany, the Netherlands, Belgium, Great Britain, France, Spain, Greece and Japan.

ping and other merchant fleets are so heavily subsidized by their governments or so closely integrated with their governments' national objectives that their operations primarily serve their respective nation's economic, political, and military policies. Where this is the case, the carriers can afford to operate without regard to traditional profit and loss consideration. In either event, their governments will intercede in the marketplace if they believe that their best interests are no served by the marketplace solution.

Third, unlike domestic surface transportation, demand for international liner transportation is inelastic. Thus the lower prices which competition theoretically brings will not generate more cargo in a trade. Moreover, since ocean transport costs averaged approximately 8 percent of value, significant reductions of such a small cost component would be unlikely to increase the amount of cargo, even if the demand were elastic.

Fourth, in international ocean liner shipping, the route to reduced unit costs and cargo rates is the attainment of higher load factors. The ocean liner industry is characterized by a very high proportion (75 percent) of fixed costs. This is the reverse of most industries where only 25 percent of costs are fixed.

With this kind of cost structure, far greater benefits can be obtained from high vessel utilization than from increased competition generated by adding to the number of liner services operating in a trade. The latter increases the vessel tonnage operated without increasing the aggregate of cargo tonnage available to be handled, thus increasing the cost of doing business.

Fifth, if it is to operate efficiently, the liner industry is far more dependent on the coordination of service than other forms of transport (efficiency-ship capacity in reasonable relationship to the volume of cargo offered).

Cargo cannot move in or out of a trade in short-run response.

Ocean liner service differs from domestic common carriers since the unit in which service is produced (the ship) is much larger in relation to available traffic volume than the units with which domestic carriers produce their service.

Not only is vessel capacity large in relation to total trade-route volume, it is especially so in relation to individual shipments. A containership may draw its individual cargo from several hundred shippers.

Finally, there are enormous capital and other constant costs in the liner industry. Today, a new container ship costs about $100 million. Not only are the vast majority of cost (such as for crew and fuel) fixed, but a vessel voyage takes significantly longer than air transport movements which have proved somewhat more amenable to open competition. Thus, once the commitment to make a sailing is made, the asset is tied up for a longer period of time, and the need to keep utilization as high as possible increases.

The Committee strongly believes that it is in our national interest to permit cooperation among carriers serving our foreign trades to permit efficient and reliable service. Our shippers need: stable, predictable freight rates than can be relied on when bidding or quoting in their foreign markets; frequent, reliable, well-tailored service to keep inventories at minimal levels while meeting market demands; a choice of responsive and efficient carriers who do not force them to subsidize empty space, old engines, or excessive crew. Our carriers need: a stable,

predictable, and profitable trade with a rate of return that warrants reinvestment and a commitment to serve the trade; greater security in investment; regulatory parity with foreign competition; and expeditious and predictable regulatory supervision.

OTHER NECESSARY LEGISLATIVE REFORMS

While the present Commission has made substantial and admirable progress, regulatory delay in the administrative process has caused hardship to parties seeking approval of section 15 agreements. Because there is no statutory time limit on Commission action, these delays have raised serious questions about the extent to which the present regulatory environment is responsive to the needs of the public which requires decisions that are reached promptly and fairly. In the Committee's view, justice delayed is justice denied.

The effectiveness of the dual rate contract system as a tying device has also been questioned. Under the dual rate system a shipper agrees to give all or some fixed portion of its patronage to the contracting conference carriers. In return, the shipper is granted a percentage discount (commonly 15 percent) from the rates applicable to those shippers which do not enter into such an agreement. A shipper who fails to abide by its exclusive patronage agreement with the conference members and utilizes a non-conference carrier in violation of the conference shipper contract is subject to damages and loss of contract privileges. Critics of the system maintain that its obligations are too easily circumvented, and its relative inflexibility adds little incentive for shippers to observe its terms and conditions.

The advent of intermodalism has caused another serious problem which threatens the efficiency of our liner services to the detriment of both conferences and shippers. In the late 1960's, the technical innovation of containerization made possible new economies of scale and thus promised the potential for substantial reductions in real costs to vessel operators and shippers. As a consequence, containerization became rapidly established on the most important U.S. trade routes. The full benefits of containerization can only be realized, however, when a container moves between shipper and consignee or between inland consolidation centers without breaking bulk. Under these circumstances, additional economies are derived from the speed with which intermodal transfer takes place, from savings in the labor and "storage" costs associated with this process, and from cost reductions in packaging and insurance as well as substantial reduction in damage and pilferage claims.[17]

The Department of Justice, however, has taken a position contrary to the FMC, claiming that the Commission has no authority to approve conference agreements providing for the fixing of through intermodal rates and that such agreements therefore violate the antitrust laws. This uncertainty regarding antitrust immunity inhibits conferences in U.S. trades from agreeing among themselves on the charge to quote shippers who choose to use conference facilities for the inland leg of a foreign door-to-door movement [18] and it clearly frustrates the growth of an innovative, efficient, and economical transportation service.

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[17] See, "Liner Shipping in the U.S. Trades," A University of Wales Institute of Science and Technology Study for the Council of European and Japanese National Shipowners' Association (CENSA) (1978).

[18] Ibid.

Many other issues regarding the need to modernize the Shipping Act have arisen, including the necessity to: permit the establishment of shippers' councils as a counterbalance to the conference system; permit closed or restricted conferences; assure the right of conference carriers to exercise independent action; clarify the authority of the Commission to investigate violations of the act by shippers and consignees; clearly require independent self-policing; and amend the definition of common carrier to specifically include non-vessel-operating common carriers.

CONCLUSION

A new statutory framework, establishing a new regulatory philosophy, is needed to allow carriers and shippers to conduct international trade in a stable, efficient, and fair manner. It must place a new emphasis on harmonizing U.S. policies and practices with those of our trading partners and removing the handicaps which our laws have imposed upon our own carriers. Domestic rules of competition may work at home and fully justify recent deregulatory approaches to re-exposing domestic transportation to the antitrust laws; they have been proven, however, not to work in international liner shipping.

Moreover, this bill recognizes that such phenomena as containerization, state-controlled fleets, the aspirations of less developed nations to possess merchant fleets, and cargo sharing arrangements by multilateral or bilateral measures were not even dreamed of when the Shipping Act, 1916, was enacted.

The Committee believes that preservation of the conference system is essential to the maintenance of a strong U.S. merchant fleet, reliable and efficient flow of trade in the U.S. foreign commerce, and achievement of the basic purposes of this bill. This does not mean the conference will necessarily be the best choice of carrier or shipper, but merely that it should be permitted where commercial considerations warrant its use.

Exemption of conferences and other concerted activities from the antitrust laws does not remove these activities from strict regulation. This bill includes many safeguards against abuses of concerted carrier power in their trades. Conference membership must be open to all qualified carriers; and conference utilizing a loyalty contract as a tying device must assure the right of independent action to each member carrier wishing to respond to shipper demands for lower rates; all conferences must establish consultation processes with shippers and shippers' councils, and independent neutral body policing is required to insure that all conference members comply with their obligations under the law as well as the conference agreement. Loyalty contract requirements have been altered to permit greater flexibility in any intermodal shipment, to preclude a conference operating under clarified intermodal authority from using the loyalty contract to limit competitive choices through alternative port ranges. Authority to enter into service contracts or to offer rates variable with time and volume commitments should promote greater pricing flexibility and responsiveness to the unique needs of particular shippers. Penalties for violating the law have been strengthened by increasing the amount of fines that may be assessed, particularly for knowing and willful violations, and by expanding actions subject to suspension of tariffs. Any aggrieved party can also file a complaint and seek reparations for any injury it has suffered.

Corrective legislation is needed simply to restore the industry to the position it held before 1961. Whatever the 1961 Congress intended, and we believe they intended to permit strong conferences, the interpretations of the 1961 amendments have placed the industry in an untenable position that must be rectified. Carriers have been uncertainly suspended between supposed antitrust immunity, by statute, and huge antitrust exposure, in fact. They have been required to prove their actions would not violate the antitrust laws in order to obtain antitrust immunity. They have been discouraged from cooperating to achieve operating efficiencies under the same law Congress designed to encourage such activities. And they have been subjected to multiple jeopardy for Shipping Act violations: civil penalties, criminal sanctions, and private treble damage actions. The basic maritime policy of maintaining a privately-owned merchant marine has become increasingly difficult because of the inability of U.S.-flag ships to maintain a reasonable market share. What we have given with our promotional hand, we have taken away with our regulatory hand. At the very least our regulatory law has to set all carriers serving our trades on par and permit U.S. carriers to compete without handicaps preordained by their own nations' law. Otherwise, no amount of promotional aid will persuade private individuals to invest in the U.S. maritime industry: we would be "marching up the hill and marching right down again."

The Committee therefore unanimously recommends that the Senate pass the Shipping Act of 1982 as a necessary step toward restoring the U.S. liner fleet to a position of leadership in the world of ocean shipping.

Legislative History

Starting in the 96th Congress, this Committee held extensive hearings on a series of proposals [19] intended to serve as a catalyst for legislation that might be necessary to produce a well-conceived, effective, modern, unified and consistent regulatory policy which is responsive to the realities of international ocean shipping.

Among witnesses representing all segments of the maritime industry there was a virtual consensus to clarify the exemption of concerted activity in ocean shipping from the United States antitrust laws; establish clearer standards and procedures, including time limits, for approval of agreements under section 15; allow greater flexibility in the type of patronage contracts offered by carriers and conferences; authorize the approval and implementation of intermodal agreements; and permit the establishment of shippers' councils.

On some of the other significant issues, the testimony varied. The question of open versus restricted or closed conferences and whether to require a right of independent action within conferences reflect areas in which a broad range of testimony was received.

In February, 1980, Committee staff released a draft proposed revision of the Shipping Act, 1916. After further comments and modifications, the Committee reported favorably and the Senate passed unanimously the Committee bill, S. 2585, the Ocean Shipping Act of 1980. Similar efforts in the House to revise the Shipping Act, 1916, failed to reach fruition during the 96th Congress.[20] At the outset of the 97th

[19] Ocean Shipping Act of 1979: Hearings on S. 1460, S. 1462, and S. 1463, before the Subcommittee on Merchant Marine and Tourism of the Senate Committee on Commerce, Science, and Transportation, 96th Congress, Serial No. 96–77, and staff working draft of 'Proposed Ocean Shipping Act of 1980,' and comments thereon.

[20] H.R. 4769, and H.R. 6899, 96th Cong.

Congress, Senator Inouye introduced S. 125, essentially identical to the bill passed by the Senate in 1980.

In August 1981, Senators Gorton, Stevens, Kasten and Inouye introduced S. 1593, a bill to accomplish basically the same objectives as S. 125, but with a view to substantially reducing the discretion of the FMC, minimizing regulatory burdens, and treating all carriers regardless of nationality with an even hand. Senator Packwood soon joined as a cosponsor.

Three days of hearings, held in September 1981, confirmed the general concensus that the 1916 Act needed overhaul. Again the issues eliciting greatest controversy involved the conflicting interests of carriers to use stronger, more stable conferences and of shippers to assure pricing flexibility and responsive services. To address ambiguities in the initial bill, to further streamline the agreement approval process, and to address shipper concerns, Committee staff issued a working draft of revisions to S. 1593, January 28, 1982. After a further round of comments, the need to focus more closely on shipper concerns motivated a series of meetings and negotiating sessions to achieve a set of compromise proposals. In the meantime, the Reagan Administration, through a letter from Secretary of Transportation Drew Lewis, endorsed the effort to revise the Shipping Act, restore blanket antitrust immunity, and substantially reduce FMC supervision. Bolstered by that stance, the FMC itself proposed elimination of pre-implementation approval of agreements, and also replacement of vague approval standards with a list of prohibited concerted activities. On March 30, 1982, another staff working draft was circulated incorporating the FMC proposals and adding provisions for independent action, time-volume rates, service contracts, and loyalty contract flexibility designed to meet shipper concerns. Final agreement was reached by all U.S.-flag carriers and major shipper representatives to seek clarifying modifications to several sections, principally regarding independent action, loyalty contracts, and service contracts. These were incorporated into S. 1593 before full Committee mark-up and the bill was unanimously reported without objection on April 22, 1982.

SUMMARY OF MAJOR PROVISIONS

This bill includes the following major substantive changes to existing law:

Places regulation of international liner shipping under a single law, motivated by a unified set of policies, and administered by a single agency.

Clarifies and reaffirms the complete antitrust immunity of ocean liner shipping operators engaged in specified collective activities.

Clarifies authority for conferences of carriers to establish intermodal rates and services.

Authorizes shippers to form shippers' councils to consult and confer with ocean carriers on general rate levels, rules, practices, or services.

Requires any conference utilizing loyalty contracts to grant its members the right to take independent action.

Eliminates pre-implementation approval of agreements required to be filed with the FMC; provides for suspension of agreements, prior to their taking effect, pending review; streamlines procedures for review of agreements; replaces vague standards of review with a precise list of prohibited acts; sets statutory time limits on Commission action; and places the burden or proof squarely on opponents.

Permits ocean carriers to enter loyalty contracts with shippers, if they meet certain specific requirements, without prior approval.

Clarifies the authority of carriers to discount rates for shippers moving a specified volume of cargo over a specified period of time and to enter contracts for rates and services subject to common carrier obligations of the act.

Eliminates the FMC's ability to scrutinize rate levels (except those of "controlled carriers"), while preserving the FMC's role as repository of tariffs and enforcer of tariff adherance.

Prohibits certain practices of conferences designed to drive independent carriers from our trades.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., April 26, 1982.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1593, the Shipping Act of 1982, as ordered reported by the Senate Committee on Commerce, Science and Transporation, April 22, 1982.

The Shipping Act of 1982 would reduce federal government involvement in ocean shipping by facilitating regulation by the Federal Maritime Commission (FMC) and permitting ocean common carriers to conduct shipping and related international activities with complete immunity from the antitrust laws. Under this bill agreements filed with the FMC would become effective after 45 days unless specifically rejected within 30 days for failing to meet certain a priori tenents.

The bill removes the requirement that filed agreements must be found "not detrimental to the commerce of the United States" or "not contrary to the public interest." In addition, the bill removes FMC's ability to reject rates found so unreasonably high or low as to be detrimental or contrary to United States interests.

The Shipping Ac of 1982 requires open conference membership, prohibits unjust discrimination and sets specific penalties for violations of this Act. The bill provides for government enforcement of quoted rates, rules and practices and prohibits unjust discrimination, predatory practices and rebating.

Though the bill deregulates the international shipping environment the exact budgetary impact on the U.S. government is difficult to estimate. FMC will still be the depository for all tariff, rate and shipping agreements and have the authority to license freight forwarders. In clarifying antitrust immunity under the Act, the bill should reduce the Department of Justice's involvement with international liner shipping.

Although CBO expects that there would be some reduction in FMC's overall $11 million budget as a result of enactment of this bill, it is not possible to estimate these savings with confidence because of the uncertainty of the revised workload of the FMC.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of this legislation.

The Committee anticipates a reduction in the FMC's regulatory ments that all concerted agreements and all dual-rate contracts receive specific FMC approval before implementation.

The routine screening of all agreements, even when uncontested and noncontroversial, has resulted in long delays before business arrangements could be effectuated. Though agreements must still be filed, there will no longer be a need to submit simultaneously to the Commission elaborate justifications of anticipated conduct. The complete exemption from the antitrust laws of matters within the purview of the Shipping Act, the streamlined procedures and time limits, the placement of the burden on opponents, and the replacement of antitrust principles with commercial ones and of vague standards with specific prohibited acts should all substantially reduce the FMC role and the time and cost burden on parties to agreements.

Copies of loyalty contracts no longer need be filed, though a sample must be included in the conference tariff. Tariffs must still be filed with the Commission, so no change in regulatory burden is expected in this regard.

Nevertheless, it is difficult to anticipate to what degree savings in budget and personnel will be possible. It might, for example, be appropriate for the Commission to maintain its present strength, shifting its efforts from preimplementation approval of agreements to postimplementation policing for compliance with prohibited acts. Even in this regard, however, the bill contemplates a major role to be taken by independent neutral policing bodies, thus alleviating some of the FMC's enforcement burden. It should be noted that the FMC has already in the past year reduced its authorized personnel from 366 full-time equivalents to 288.

Finally, by replacing antitrust standards with commerical standards, vessel operators in our international trades should be able to operate more efficiently, which, in turn, should make U.S. exports more competitive.

AGENCY COMMENTS

In addition to receiving agency comments during the hearings, the Committee subsequently received the following comments from the Department of Transportation and the Federal Maritime Commission:

THE SECRETARY OF TRANSPORTATION,
Washington, D.C., February 5, 1982.

Hon. SLADE GORTON,
Chairman, Merchant Marine Subcommittee, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR SLADE: On behalf of the Reagan Administration, I would like to outline our position on regulatory reform of the ocean ship-

ping industry. First, however, I commend you, Senator Packwood and Senator Inouye, for your initiatives in this area. Your bill, S. 1593, as introduced, and Senator Inouye's bill, S. 125, go a long way toward removing the restrictive burdens currently imposed upon U.S.-flag and other carriers engaged in our trades. We look forward to working with you and the other members of the Commerce Committee to refine all our efforts into an approach that will be in our overall national interest and that will meet the needs of our maritime industry.

In the Shipping Act of 1916, Congress recognized that a balance had to be struck between the ocean carriers' need to engage in certain cooperative activities, such as the setting of rates, and the public's need to prevent abuses. Since the passage of the Act, however, both the enforcement and the judicial interpretations of the law have undergone substantial change. As a consequence, carriers operating in our trades are unable to predict reliably the extent of the antitrust exemption under the Shipping Act. Because in some circumstances they are subject to the antitrust laws, they are unable to engage in many activities that are common on other trade routes. Ocean carriers throughout the rest of the world operate with substantially less government restriction on their activities.

Only the United States has followed a philosophy which limits the activities of conferences through a combination of regulatory and antitrust oversight of rates and practices. The result has been insecurity, delays in regulatory approvals for or rejection of practices standard elsewhere, excessive and unpredictable government intervention, and the anomalies and irritations that inevitably arise from the attempt to impose our laws on foreign parties whom our laws can only imperfectly control. Our foreign counterparts feel imposed upon in the name of a policy they do not embrace, and our own operators are the victims of an ever-changing regime that is only partially effective when applied to their foreign competitors.

It is now time to reconsider and simplify our approach. In developing the Administration's approach to these problems, we have been guided by three major objectives:

First, this Administration is committed to minimizing government intervention in business. The reduction of government involvement in the commercial practices of the maritime industry is consistent with this philosophy and underlies our position. It should not be the responsibility of the Federal Maritime Commission to determine what industry practices might best achieve the efficiencies required by the marketplace.

Second, we want to put U.S. carriers on an equal footing with foreign carriers. In regulating our maritime industry, we are out of step with the rest of the world. U.S. antitrust policy should not be imposed unilaterally on other nations that favor cooperation among ocean carriers. In the interests of both international comity and fairness, we must recognize the realities of international commerce in which our industry operates and limit its commercial activities only where we can clearly identify other overriding national objectives.

Third, we want to maintain a strong U.S. merchant marine. The President has pledged to reestablish the economic health of our merchant marine, to support our commercial interests abroad, and to meet the need for logistical support for national defense in time of emergency. Restructuring the regulatory framework within which the

ocean liner industry operates would be beneficial to the industry, and it is the first step in the implementation of the President's commitment.

We have translated these objectives into specific proposals for reform in the ocean liner industry affecting several key areas: conference activities, filing and approval of agreements, tariff filing and enforcement, independent carriers, and, finally, the very significant question of antitrust immunity. We also have recommendations in the areas of shippers' councils and controlled carriers.

CONFERENCE ACTIVITIES

Current law requires that conferences in U.S. trades be open to all carriers regardless of flag. Outside of the U.S. trades, closed conferences which may set prices and allocate capacity, routes, and cargo are the rule. We believe that conferences in the U.S. trade should be free to organize along the lines of conferences in the rest of the world, or in any other way they wish, with one caveat which I will discuss below dealing with abuse of conference power. These changes will enable conferences to control capacity, to offer stable and reliable services, and to set rates which reflect a high utilization of their capacity.

Allowing conferences to organize as they wish means that rationalization, including pooling agreements to share revenues or cargoes, should not be prohibited. The industry should not be prevented from choosing to rationalize and pool if it will enable the carriers to improve their financial situation through steadier revenues and greater capacity utilization.

Conferences also should not be prohibited from setting intermodal through rates if they so choose. Conferences presently set rates from U.S. ports to internal points in other countries; they should be able to extend those intermodal through rates to internal points within the U.S. However, while we think conferences should be allowed to set intermodal through rates, we strongly believe that only individual carriers should negotiate the division of the rate between ocean and inland carriers. Granting ocean conferences the authority to use their conference power to negotiate divisions with individual inland carriers conflicts with domestic surface transportation objectives. Consistent with recent legislation to deregulate domestic transportation, inland carriers are now prohibited by the antitrust laws from acting collectively on the division of rates. We believe the same prohibition should apply to conferences. Inland and ocean carriers should be permitted to negotiate the division of intermodal through rates only on an individual basis.

With regard to loyalty contracts, we believe that conferences and shippers should be allowed to negotiate whatever form of contracts they may find to be in their mutual interest, to cover whatever commodities and to provide whatever discount may be appropriate, without statutory restriction. Such contracts permit better planning and promote full equipment utilization. The parties to such loyalty contracts should not be hampered from achieving these or other objectives by arbitrary restrictions on their freedom to contract.

Similarly, we believe that interconference agreements and rate agreements should be allowed without any regulatory requirements or restrictions. Rate agreements allow independent carriers, on a selective basis, to achieve some of the benefits associated with ocean carrier cooperation in our trades.

Finally, the measures necessary to prevent conference abuses in U.S trades require minimal governmental intervention. We recommend statutory prohibition of clearly predatory practices, such as:

Fighting ships, which are vessels subsidized by the conference and used essentially to drive other ocean carriers out of a trade.

Deferred rebates. Shippers should not be tied to a conference mechanism that, in effect, allows conferences to fine shippers for dealing with independents.

Exit penalties. Conference members should be free to quite a conference on short notice without penalties if they wish.

Each of these prohibitions is designed to prevent the conference from exercising its power in a fashion that would impede independent carriers from operating in U.S. trades.

FILING AND APPROVAL OF AGREEMENTS

Present law requires filing all agreements with the Federal Maritime Commission, which determines whether the agreement is "in the public interest." Historically, filing and approval of agreements has been justified on the grounds that conference agreements are inherently anticompetitive and must undergo rigorous government scrutiny if they are to enjoy antitrust immunity. The primary problems have not been with the requirement for approval. They have arisen over the interpretation of the vague and arbitrary public interest standard, and with the FMC approval process, which has been uncertain, expensive and lengthy. We also believe that vague standards such as "unjustly discriminatory" or "detrimental to U.S. commerce," are likewise subject to the same lack of definition which will create confusion, extended approval processes and inefficiency.

Instead, our approach is to continue the requirement that all conference agreements be filed with, and approved by, the FMC, but only so that specific predatory practices can be effectively prohibited. The approval process should be routine, consisting of a simple examination of the agreement to ensure that it does not contemplate such practices. This review should be completed within 30 days. The approval would be automatic if the agreement did not contain any prohibited activities. The practices to be prohibited would be described precisely and are those set forth above. Regulatory review based upon the vague standards set out would be eliminated, and prohibited practices which are alleged would have to be proven in a hearing process within an additional 90 day period.

TARIFF FILING AND ENFORCEMENT

The United States is almost unique in the developed world in mandating tariff filings and overseeing their enforcement. In almost all other OECD countries, tariffs are commercially published, but the government plays no role in either the publication or enforcement process.

We favor eliminating the requirement that tariffs, other than for controlled carriers, be filed with and enforced by the FMC. Current requirements represent unwarranted government intrusion into the industry. However, all ocean carriers in our foreign trades should be required to make their tariffs available through a commercial organization in order to continue to provide shippers with information on ocean shipping rates and services. Any specifically prohibited prac-

tice reflected in a tariff could be investigated by the FMC upon the complaint of an aggrieved party. Conferences would be allowed to police their members' adherence to the conference rate.

INDEPENDENT CARRIERS

The Administration continues to support the presence of independent non-conference operators in the U.S. trades. Independents exert pressure on the conferences in our trades to maintain reasonable and competitive rates. Furthermore, their presence ensures that shippers will have options other than conference service available to them. In order to guarantee independents the opportunity to operate in our trades, the identified restrictions must exist so that conferences do not engage in retaliatory and predatory practices against independents. Such restrictions would include the prohibition against the use of fighting ships and deferred rebates, mentioned above.

ANTITRUST IMMUNITY

Under present law, carriers are encouraged to act collectively but sometimes are in danger of having violated the antitrust laws. Because of this uncertainty—and administrative delay in obtaining exemptions—carriers have been constrained from making otherwise sensible commercial decisions.

Present Section 15 of the Shipping Act specifies those ocean carrier agreements that must be filed before the FMC. We believe that all such agreements and all ocean carrier activities contemplated by such agreements or necessary to attempt to reach such agreements should be clearly immune from the antitrust laws, without any danger of application of antitrust penalties. The exclusive remedy for engaging in prohibited predatory activities should be under the Shipping Act.

SHIPPERS' COUNCILS

Testimony at recent Congressional hearings has addressed the need to grant antitrust immunity to American shippers so that they could form shippers' councils to counterbalance the increased power which might be exercised by closed conferences in the U.S. trades. It is not clear that such a step is either necessary or even desired by shippers. We would not support a grant of antitrust immunity to shippers' councils absent a persuasive demonstration that they are needed and economically justified. We do favor, however, legislative language that clearly authorizes carriers to deal freely—individually or as conferences—with foreign shippers' councils.

CONTROLLED CARRIERS

Current law authorizes the FMC to regulate the rates offered by controlled carriers when operating as cross-traders in U.S. trades. We support the retention of these provisions in any regulatory reform legislation considered by your committee. We think it would be appropriate, however, to exclude the application of these provisions to the carriers of non-communist developing nations as we have done already for non-communist developed nations.

In summary, the Administration believes that—to the greatest extent possible—the members of the ocean liner industry should be

free to conduct their business as they see fit, free of government intervention in the form of unnecessary regulations, vague standards, or threatened penalties under changing interpretations of antitrust laws. The ease of entry into shipping markets and specific prohibitions on certain predatory practices is the extent of intervention needed to prevent any group of carriers from accumulating or misusing excessive market power. These policies would reinstate the balance between the needs of the public and the needs of the carriers that the Congress envisioned when it passed the Shipping Act, 1916.

In closing, let me reiterate the President's commitment to the U.S. maritime industry and say again how much we look forward to working with you and your staff in the months ahead.

Sincerely,

DREW.

FEDERAL MARITIME COMMISSION,
Washington, D.C., February 12, 1982.

Hon. SLADE GORTON,
Chairman, Subcommittee on Merchant Marine, Room 126 Russell Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed are comments by the Federal Maritime Commission on the Staff Working Draft of S. 1593. The Commission has, in addition to our prepared testimony, previously offered detailed analyses of the provisions of the bill and has filed responses to written questions from both Senators Gorton and Inouye. At this time, we would like to offer our views in narrative form on certain of the policy issues in the bill, most notably the standards and procedures for handling agreements. We also offer technical comments in an Appendix to this letter. These comments are confined to matters of form and consistency of language. The time allowed for comments does not permit us to submit a more comprehensive analysis of the Staff Working Draft. We have chosen to confine our comments to previously unaddressed issues important to the Committee and to the Commission. We would be happy to provide more details with regard to our position or particular provisions of the bill if requested.

PROCEDURES FOR AGREEMENTS

The staff draft has made significant advances over current law and previous legislative proposals by creating a procedure designed to ensure prompt implementation of agreements. Under section 5 of the draft, agreements would become effective within 60 days of filing unless the Commission institutes a hearing either on its on motion or on complaint by an aggrieved party. It is our view that this procedure will guarantee prompt implementation of the vast majority of agreements. Even under current law, the number of agreements subjected to formal pre-implementation adjudication is quite small. The new procedure of section 5, coupled with other provisions of S. 1593, should further reduce this already minor category of agreements while promoting the expeditious processing of agreements.

Further refinement of the Staff Working Draft should, however, address the Commission's past difficulties in administering the Shipping Act's pre-implementation approval responsibilities. The Commission has been criticized for initiating proceeding on protests, intiating proceedings on its own motion, and failing to initiate proceedings.

If the Commission elects to initiate and investigation into the approvability of a newly-filed agreement, it must do so without operational data on the actual impact of the agreement. This lack of data requires the Commission to engage in wide-ranging investigations based on allegations and suspicions which may ultimately prove unsupported. These problems will continue under S. 1593 as presently drafted.

To alleviate these problems, the Commission proposes that its review of the effects of an agreement be limited to the post-implementation phases of the agreement's operation. The Commission believes that many of the difficulties of the past procedures relate to the speculative nature of Commission review prior to operational experience under the agreement. The most rational and least burdensome regulation of agreements can occur only after an agreement has been in operation for a sufficient time to provide the Commission and all affected parties actual evidence of the effects of the agreement. Proceedings can then focus on evidence of actual events and the shipping public will have assurances that agreements will not be marched through the quagmire of formal hearings on speculative or ephemeral matters. This alteration of current procedures would retain what we believe are valid concerns of earlier Congresses, while eliminating fruitless, time-consuming regulatory hearings.

The effect of the above-suggested alteration would be to allow agreements to go into effect unless rejected for failure to comply with the provisions of section 5. Commission investigations of agreements would be confined to the "post-approval" phase of the agreement and could be initiated by the Commission on its own motion or by the complaint of an affected private party. Such a procedure may permit a downward adjustment of the 60-day time frame of section 6(a). It also obviates the need for the detailed supporting statement required by section 5(a) of the Staff Draft. Section 6(j) would become the operative paragraph governing Commission proceedings on agreements. The following adjustments to the language of subsection 6(j) would be appropriate:

> "(j) HEARING ON AGREEMENTS.—The Commission may, at any time after an agreement [is approved or in] *comes into* effect, institute an investigation and conduct a hearing pursuant to section 13(e) to determine if the agreement [continues to] meet*s* the standards of subsection (c), and if not, whether such agreement should be *disapproved*, canceled or modified.[1] Any agreement which is the subject of such an investigation and hearing shall remain in effect during the investigation and hearing."

Under section 6(j) the Commission may institute a proceeding at any time, but not until it has good and sufficient reason to do so. Thus, the Commission can gather the evidence, ascertain the facts, and then decide whether a hearing is warranted.[2]

We suggest that if the Committee would favor some mechanism to protect carriers and shippers from the effects of a truly predatory agreement prior to its effective date, consideration should be given to granting the Commission authority to request a United States District Court to enjoin the implementation of the agreement pending inquiry

[1] See our comments, infra, on revisions to the standards set forth in section 6(c) of the Staff Draft. We have also proposed revisions to section 12 (Prohibited Acts) which will affect proceedings on agreements.

[2] We would suggest that section 6(1), which authorizes the Commission to disapprove any agreement for failure of a proponent to comply with a subpoena or discovery order in a proceeding, be amended to include failure of the parties to an agreement to respond to an order issued under section 17(a). That section replaces the present section 21 of the Shipping Act. See Appendix page 5.

by the Commission. Such authority is similar to that of other agencies.[3] We contemplate that use of this procedure would be confined to situations in which an agreement on its face contemplated activity violative of a revised section 12.

STANDARDS FOR AGREEMENTS

Section 6(c) of S. 1593 sets forth the standards for action on agreements that are ordered to a hearing. It directs that the Commission shall disapprove any agreement that it finds will operate in violation of any provision of the Act, is unjustly discriminatory or unfair as to specified persons including carriers, shippers or ports, or will operate to the detriment of the commerce of the United States. These standards contain language identical to that currently in section 15 of the Shipping Act of 1916 with the important exception that section 15's public interest standard has been deleted. The Committee staff has particularly requested comments on whether the standard of "detrimental to commerce" should be retained under the new Shipping Act of 1982.

The inclusion of the standard "detrimental to commerce" by the drafters of the 1916 Act recognized that a variety of circumstances could render agreements considered beneficial by carriers to be contrary to the general interests of the commerce of the United States. The Alexander Committee's investigation of the steamship industry revealed widespread abuses which were deemed inherent to the system of conferences and agreements which had developed in the industry. Two alternatives were possible: either the conferences and agreements could be prohibited altogether, or they could be brought under some form of government control. The Committee believed that the elimination of conferences and agreements would ultimately do more harm than good:

"To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement." H. Doc. No. 805, 63rd Cong., 2nd Sess. at 416 (1914).

Government control was seen as the best means to retain the benefits of the conference system while curbing its inherent abuses. Among the recommendations of the Committee is the following:

"That all carriers engaged in the foreign trade of the United States, parties to any agreements, understandings, or conference arrangements hereinafter referred to, be required to file for approval with the interstate Commerce Commission a copy of all written agreements (or a complete memorandum if the misunderstanding or agreement is oral) entered into (1) with any other steamship companies, firms, or lines engaged directly or indirectly in the American trade, or (2) with American shippers, railroads or other transportation agencies. All modifications and cancellations of such agreements or understandings as may be made from time to time should also be promptly filed. The Commission should be empowered to order cancelled any such agreements, or any parts thereof, *that it may find to be discriminating or unfair in character, or detrimental to the commercial interests of*

[3] Federal Trade Commission, 15 U.S.C. 53; National Labor Relations Board, 29 U.S.C. 160(j); Occupational Safety and Health Review Commission, 29 U.S.C. 661.

the United States." H. Doc. No. 805, 63rd Cong. 2d Sess. at 119, 420 (1914). [Emphasis supplied.]

This recommendation formed the basis for the "unjustly discriminatory" and "detrimental to commerce" standards which appear in section 15 of the Shipping Act, 1916.

S. 1593 quite correctly favors the swift implementation of most agreements and attempts to ensure minimal government involvement and complete immunity from the antitrust laws. Given these commendable objectives, the Commission supports exploration of alternatives to a "detrimental to commerce" standard which allay concerns which have arisen on the uses of that standard.

We understand that objections to the "detrimental to commerce" standard are based in large measure upon the argument that it is too vague a standard for the Commission to implement in a consistent and fair manner and for the regulated industry to be sufficiently apprised of the legal standards to which its agreements must conform. Like many other phrases in American statutes, the term, "detrimental to commerce" has been refined through case law to acquire a set of meanings easily understood by affected interests. The insertion of the "public interest" standard in the 1961 amendments to the Shipping Act led to emphasis in the Courts and the Commission on development of guidelines under that standard. Controversies over the applicability of the "public interest" standard have consequently overshadowed development of "detrimental to commerce" inquiries.

Case law which has given meaning to "detrimental to commerce" illustrates the kinds of agreement activities which may be of valid concern to the public. For example, in *Port Utilities Commission of Charleston* v. *Carolina Co.*, v U.S.S.B. 61, 73 (1925) the Commission's predecessor found that agreements which resulted in foreign domination of a large portion of U.S. commerce was "detrimental to commerce." An agreement which impedes free choice among alternatives provided by technical change has been found by the Commission to be "detrimental to commerce." *Swift & Co.* v. *Gulf & Southern Atlantic Havana Conference*, 6 F.M.B. 215, 226 (1961).

The Commission has determined that it would be "detrimental to commerce" for a conference to require that a merchant obligate himself in five trades in order to get contract rates in a single trade. *Dual Rate* Cases, 8 F.M.C. 16, 50 (1964). Likewise, In Agreement—U.S. Atlantic & Gulf/Australia-New Zealand Conference, 9 F.M.C. 1, 9 (1965) the Commission concluded that the extension of a dual rate scheme to cover both Atlantic/Gulf and the Great Lakes would be "detrimental to commerce."

In Agreement Nos. 9902–3 et al., 21 F.M.C. 911, 915–916 (1979), the Commission found that a joint service agreement which resulted in overtonnaging in a trade may be "detrimental to commerce."

While the remaining standard of approval—that of unjust discrimination—is an important protection for parties that may be affected by a proposed agreement, it nevertheless is not broad enough to reach an agreement which, while not operating in violation of any provision of the Act nor having an unjustly discriminatory effect, may still cause substantial harm to U.S. commerce. An example of such an agreement would be an arrangement among carriers which would block implementation of innovative transportation systems, such as intermodal transportation arrangements.

The Administration has opposed on vagueness grounds the continuation of both the "unjustly discriminatory" and "detrimental to com-

merce" standards of section 6(c)(2) and (3). At the same time, the Administration shares the Commission's concern that provisions must be retained which address potential "abuse of conference power" and "predatory practices."[4]

After a great deal of internal research and consultations with representatives of the Administration, we believe that deletion of the "detrimental to commerce" standard can be accomplished by revisions to the Prohibited Acts section of the bill. The Administration and the Commission are mutually satisfied that refinement of the Prohibited Acts section of the bill provides a means by which concerns over the effects of certain agreements can be reconciled with the widespread desire to eliminate wasteful government interference at the pre-implementation stage of an agreement's life. Both the Administration and the Commission have endeavored to confine amendments of the Prohibited Acts provisions to circumstances which reflect actual problems identified by Commission case law.

We therefore strongly urge that the following language be inserted in section 12 and that, with these amendments, the standards of section 6(c)(2) and (3) can be deleted:

(e) BY CARRIERS ACTING IN CONCERT.—No Conference, joint service, or any other agreement entered into with respect to any activity described in section 4 may—

(1) result in a concerted refusal to deal (group boycott);

(2) utilize a device or means which sets conditions or otherwise restricts the ability of a shipper to select a carrier in a competing trade;

(3) directly restrict through any unjust or unfair device or means the entry of any carrier who would otherwise be willing and capable of serving the trade;[5]

(4) restrict the employment of intermodalism or other technological innovations by member carriers; or

(5) engage in any predatory practice designed to eliminate the participation of any non-member carrier in the trade.

The position stated herein also contemplates insertion in section 12 of language which transfers the "unjustly discriminatory or unfair" standard of section 6(c)(2). Drafting adjustments would be necessary to make the language of section 6(c)(2) compatible with the language we have proposed in section 12(e).

TARIFFS

Under the provisions of S. 1593, tariff-filing requirements establish a central repository for carrier price information. The availability of this price information is a central component of a competitve ocean transportation system. Unlike tariffs in domestic surface modes and other utilities, tariffs in the foreign ocean trades are not part of a regulatory scheme which controls the levels of rates or requires approval of rate levels by a regulatory body. Increases can be implemented only on 30-day notice. This requirement protects American importers and exporters from sudden rate fluctuations which can hamper their ability to compete effectively in international markets. Rates can be lowered on immediate notice. Concern that tariffs impede

[4] See letter of the Honorable Drew Lewis, Secretary of Transportation, to Senator Slade Gorton, dated February 5, 1982.

[5] To the extent that the Committee deems qualifications or capabilities to be an issue which requires further definition, we suggest that the Committee Report reference language from the Merchant Marine Act, 1936, 46 U.S.C.A. § 1171(a)(2) and (a)(3).

price flexibility is quickly allayed by examining the history of rate levels in major U.S. liner trades over the past decade.

This completes our prepared comments with regard to the Staff Working Draft of S. 1593. If you have any questions concerning our response or if we may be of assistance with regard to any other matter, please do not hesitate to contact me.

Sincerely,

ALAN GREEN, Jr., *Chairman.*

SECTION-BY-SECTION ANALYSIS

Section 1.—Title

The Bill, if enacted, may be cited as the Shipping Act of 1982.

Section 2.—Declaration of policy

This section states the objectives of regulating international liner shipping. They are included to clarify the rationale for regulating at all (many nations do not) and, more particularly, for revising the Shipping Act, 1916 [hereinafter referred to as "the 1916 Act"], as it relates to foreign commerce. Naturally, these objectives should guide interpreters in determining congressional intent and the Commission in promulgating rules and regulations.

To meet the needs of the U.S. foreign commerce, the first objective states the centerpiece of our regulatory policy, to develop and maintain an efficient ocean transportation system through commercial means, with minimum Government involvement. Excessive Government involvement has unecessarily interfered in many aspects of shipping activity where commercial parties more appropriately should govern their own conduct. Wherever Government supervision could be reduced with confidence that shippers, ports, and independent carriers would remain protected, the bill does so. For example, sections 4, 5, and 6 permit agreements to engage in concerted activity with very little pre-implementation scrutiny by the Commission; section 7 eliminates the requirement that the FMC approve loyalty contracts in advance of their use; section 9 preserves the Commission's function as repository and enforcer of tariffs but not as a reviewer of rate levels,[21] and also clearly authorizes time-volume rates and service contracts; section 12 enumerates specifically prohibited acts that replace vague pre-approval standards applicable to agreements under current law; and section 18 grants the Commission broad exemption power to be used whenever requirements of the act are unnecessary to its regulatory purposes.

The other policy objectives follow from the first one. Principally motivating this revision of U.S. shipping regulatory law is the need to reaffirm that the United States will permit internationally accepted commercial means of meeting the objectives of responsive and efficient ocean transportation service. The bill thus reaffirms and clarifies the authority of ocean carriers to cooperate and coordinate services with antitrust immunity, in harmony with international shipping practices, subject to minimal supervision exclusively by the Commission.

Paragraph (4) recognizes a time honored principle of international law that, quite simply, foreign ocean commerce is a two-way street involving the United States and its foreign trading partners. While the Commission is not expected to abdicate its responsibilities under

[21] An exception to this statement is set forth in section 10 for controlled carriers who must maintain rates and practices that are just and reasonable.

this bill in the face of foreign opposition, it is encouraged to administer this bill in a way that will minimize conflicts with the interests of our trading partners. On the other hand, foreign carriers must comply with our rules if they are to participate in our trades. Disparity of regulation of liner shipping among trading partners can be harmful to U.S. commerce.

Paragraph (5) states the intent to allow carriers to enter cooperative working arrangements to better utilize their capital resources in order to achieve greater efficiencies in their operations with concomitant savings to shippers and improvements in return on investment. Simply because an agreement between or among carriers reduces competition does not mean it is unlawful or contrary to the objectives of this bill.

Thus, the antitrust laws will have no place with respect to activities and agreements authorized or prohibited under this bill. The Shipping Act exclusively, as administered by the Commission, will prescribe the rules, protections, and sanctions necessary to regulate international shipping effectively. The Commission should carry out its responsibilities in a manner that advances the ocean transportation system.

Section 3—Definitions

This section defines all terms used in the bill that require specific explanation. Many are new and those that derive from the Shipping Act, 1916, have been revised where necessary to insure clarity or effectuate changes included elsewhere in the bill.

(1) "Agreement" is adapted from section 15 of the 1916 Act.

(2) "Antitrust laws" is adapted from section 15 of the 1916 Act. Any amendments to these acts and acts passed to supplement their coverage are to be included within this definition, though enacted subsequent to this bill.

(3) "Assessment agreement" is adapted from section 15 of the 1916 Act.

(4) "Bulk cargo" is adapted from sections 14b(8) and 18(b)(1) of the 1916 Act.

(5) "Commission" means the Federal Maritime Commission, established by Reorganization Plan Number 7 of 1961.

(6) "Common carrier" means a carrier offering liner service to the general public and does not include ocean tramps or ferryboats. Carriers subject to this legislation are distinguished from water carriers subject to the Interstate Commerce Commission's, jurisdiction. The definition also provides that carriers operating solely through ports of contiguous nations are *not* included within the terms of the definition. This definition applies only to the extent the passengers or cargo transported are loaded or discharged at a U.S. port. Thus, a liner carrier that accepts U.S.-origin intermodal cargo (or, for that matter, Canadian-origin cargo) at Halifax and calls at Boston for further loading en route to Rotterdam would be a "common carrier" for purposes of the bill only with respect to the Boston-Rotterdam leg of its voyage. This term is used in the subsequent provisions of the bill when the intent is to cover both "ocean common carriers" and "non-vessel-operating common carriers".

(7) "Conference" makes a critical distinction between conference agreements and other types of agreements: conferences are authorized to publish tariffs on behalf of their members. The definition does not include joint service, consortium, and certain transshipment arrange-

ments that also may operate under a common tariff but are not essentially rate agreements in and of themselves; thus the requirements of section 5 (c), (d), and (e) do not apply to these specialized arrangements, whether operating within a conference or outside of a conference. The definition also makes clear that only vessel-operating "ocean common carriers" may be members of a conference agreement.

(8) "Controlled carrier" is adapted from section 1 of the 1916 Act.

(9) "Deferred rebate" is adapted from section 14 of the 1916 Act.

(10) "Fighting ship" is adapted from section 14 of the 1916 Act.

(11) "Forest products in an unfinished or semifinished state" expands the definition of "softwood lumber" contained in section 18(b)(1) of the 1916 Act. It is directed at exempting certain commodities from both the tariff filing and loyalty contract provisions of the bill.

(12) "Loyalty contract" is adapted from section 14b of the 1916 Act.

(13) "Marine terminal operator" is adapted from the definition of "other person subject to this act" contained in section 1 of the 1916 Act.

(14) "Maritime labor agreement" is adapted from section 1 of the 1916 Act.

(15) "Non-vessel-operating common carrier" gives statutory recognition to this marine operator who acts as consolidator and intermediary between vessel operators and shippers of less-than-container loads. The shipper status of an NVO, in its relationship with the vessel operator, is intended to accord to NVOs the same protection as is accorded other shippers, such as the prohibition against unjust discrimination.

(16) "Ocean common carrier" is a "common carrier" who operates a vessel in ocean transportation.

(17) "Ocean freight forwarder" has been redefined to track more closely the functions for which a forwarder receives compensation. The use of the word "dispatches" is intended to exclude from the scope of the term those persons who act only as brokers or agents. It is not intended that booking or space arrangement activity by an ocean common carrier or its steamship agent would make either an "ocean freight forwarder" as well. Clearly, though, one entity might act as both a ship's agent and a forwarder. The definition also deletes the prohibition contained in the Shipping Act, 1916, against a shipper obtaining a forwarder's license. Thus, while a shipper may forward for its own account without obtaining a license (section 11(b)), if a shipper provides forwarding services for other shippers, it must conform to the licensing and bonding requirements of the legislation. Forwarders outside the United States are not regulated.

(18) "Person" is adapted from section 1 of the 1916 Act, clarified to include individuals.

(19) "Service contract" is a contract between an ocean common carrier or conference and a shipper representing rate and service commitments between the parties; a service contract must be filed and is subject to the tariff filing requirements and common carrier obligations of the bill.

(20) "Shipment" is adapted from section 18(b)(7) of the 1916 Act.

(21) "Shipper" is defined broadly to include any person for whose account the ocean transportation of cargo is provided as well as consignees of such cargo; (22) "shippers' council" limits the jurisdiction of the Bill to councils organized under U.S. law (though foreign shippers' counsels are mentioned once in section 8(a)(7) to clarify their

immunity from U.S. antitrust laws). It also excludes from membership non-vessel-operating common carriers and ocean freight forwarders; thus, under this bill, a shipper who also acts as a licensed ocean freight forwarder would be excluded from membership in a shippers' council. Shippers' councils may include exporters or importers.

(23) "Tariff" is broadly defined and derives in part from section 18(b)(2) of the 1916 Act; (24 and 25) "through rate" and "through transportation" are used to clarify the tariff filing requirements of section 9 of this bill, with reference to both through all water transportation and through intermodal transportation (part of which is provided by a common carrier as defined in this bill). "Continuous transportation between origin and destination" does not preclude interruptions in movement due to normal commercial considerations, such as Customs requirements, in-transit storage, labor or transportation delays, or causes beyond the control of the shipper, common carrier or consignee involved.

(26) United States includes the Nation as well as its states, territories, and possessions. Reference in the bill to "United States district court", however, means only Federal court.

Section 4.—Authorized activities

This section authorizes a broad range of concerted activity based on commercial relationships with a minimum of governmental interference. It describes those types of agreements that are to be subject to Commission jurisdiction. These activities and agreements are exempted from the antitrust laws by section 8. It is not intended, however, to relieve any class of agreement from complying with section 12 or other provisions of the act.

Subsection (a) allows ocean common carriers, among themselves, collectively to: discuss, fix, and regulate rates, accommodations, and services including through rates and services; pool or apportion earnings, losses or traffic; allot ports or restrict or otherwise regulate the number and character of sailings between ports; limit or regulate the volume or character of cargo or passenger traffic to be carried; engage in exclusive, preferential, or cooperative working arrangements; control, regulate, prevent, or destroy competition; and consult and confer with shippers' councils.

With two exceptions, the enumerated activities are essentially identical to those permitted under section 15 of the 1916 Act. First, subsection (a) clarifies both the authority of ocean common carriers to fix through intermodal rates and the Commission's jurisdiction over those intermodal rates and services (currently being challenged in *United States* v. *Federal Maritime Commission*, No. 79–1299 (D.C. Cir., March 19, 1979). There is, however, no authorization for ocean carriers collectively to negotiate rates, divisions, contracts or routes with carriers providing transportation within the United States; these negotiations for inland rates and services must be negotiated one-on-one. Thus the jurisdiction of the Interstate Commerce Commission over inland carriers is unaffected. Second, specific authority to consult and confer with shippers' councils complements the authority in subsection (c) for shippers to establish councils to consult and confer with the carriers or conferences.

Two changes made to paragraph (6) of subsection (a), which authorizes carriers to agree to "control, regulate, prevent, or destroy competition," warrant special comment. First, as introduced, S. 1593

did not initially include the word "destroy". Though that word appears to encourage offensive conduct, it had been included in section 15 of the 1916 Act and has been restored here because agreements for concented economic activity inherently do eliminate competition in certain respects among their members and because it is necessary largely for jurisdictional reasons to confer immunity that is coextensive with the scope of the antitrust laws (which generally prevent one from destroying competition). Of course, any activity apparently authorized by section 4, and consequently granted antitrust immunity by section 8, is limited in effect by the prohibited acts of section 12 (and by other requirements of this bill); thus, in particular, carriers could "control, regulate, prevent, or destroy competition" only insofar as they are not violating other provisions of the bill, such as by engaging in unjustly predatory practices. Second, the bill initially limited the authority of section 4(a)(6) to actions of carriers affecting competition "among themselves." The Committee, however, concluded that any agreement between carriers that affects competition "among themselves" will almost invariably affect the competitive posture of other nonconference carriers as well, and the parties must not be left with antitrust exposure for such effects. It is, by specific design, a purpose of the conference to obtain caroges that would otherwise be transported by existing or potential nonconference carriers. Instead, the focus of the drafters was on ensuring that the prohibited acts and the sanctions for violation were sufficiently drawn to assure adequate protection against abuses of concerted shipping activity under a single act.

Subsection (b) authorizes marine terminal operators, among themselves, collectively to: discuss, fix, and regulate rates; pool or apportion earnings, losses, or traffic; and engage in exclusive, preferential or cooperative working arrangements. These all are activities permitted currently by section 15 of the 1916 Act.

Section (c) provides, for the first time, antitrust immunity to shippers, acting through shippers' councils, to confer and agree among themselves and to consult and confer with ocean common carriers or conferences on the broad range of general rate levels, charges, classifications, rules, practices, or services, offered. They may not, however, confer upon specific commodity rates; nor may they negotiate, agree, or contract with ocean common carriers or conferences. (Section 4(a)(7) provides reciprocal authority to carriers acting collectively.)

Setion 5.—Agreements

This section sets forth those prerequisites that must be met before any agreement can take effect under section 6(a).

Subsection (a) requires every agreement, written or oral, entered into with respect to activities authorized in section 4 to be filed with the Commission before being implemented by the parties to the agreement. A brief supporting statement, designed to assist the Commission in expeditiously processing agreements and to inform potentially affected parties, must accompany each agreement when filed. It in no way places the burden of justifying the agreement on proponents as is presently required in some cases by *Federal Maritime Commission* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968). The requirement to file a supporting statement should be administered consistently with the intent of this bill to minimize paperwork and regulatory burdens.

Under subsection (b), the Commission may establish reasonable regulations regarding the form and manner of filing agreements. This authority does not empower the Commision to prescribe a standardized agreement format for what are essentially contractural arrangements. Agreements which, on their face, do not comply with those regulations or with the other standards of this section may be rejected within 30 days of filing. (Agreements which on their face violate one of the prohibited acts in section 12 could not be rejected summarily under this authority but could be suspended pending a hearing pursuant to section 6.)

Subsection (c) requires conference agreements to include certain elements similar to those currently required by section 15 of the 1916 Act. Open conference membership is mandated and exit penalties are precluded. Independent neutral policing bodies must be engaged by each conference, though the Commission, pursuant to section 18, could grant an exemption where the cost of neutral body self-policing would not be justified given the size of the trade. Conferences much also establish processes for consulting and communicating with shippers and responding to their requests and complaints; this requirement assures that carriers cannot hide behind their collective organization and refuse to be responsive to those who rely on their services.

Conferences utilizing loyalty contracts must grant their members the right of independent action with respect to rates and services ordinarily required to be specified in the applicable common carrier tariff by section 9(a). This statutory right of independent action, however, reaches only those services required to appear in the conference tariff. Time limits are set out in section 5(d), marking the maximum time available under the procedures; independent action may be taken in a shorter time, subject of course to the requirements of section 9(d). An "independent action" rate included in the conference tariff will be the "tariff rate" for purposes of section 7(a)(8) of the bill for those carriers adopting the independent action rate. Therefore, a loyalty contract rate on the commodity involved will be lawful for both those carriers and contract shippers so long as a 15-percent spread or series of spreads from the "independent action" rate is not exceeded.

Independent action must also be permitted for each conference in any agreement between conferences serving different trades that would otherwise be naturally competitive.

Subsection (f) requires shippers' councils to exclude shippers that have no direct financial interest in the export or import of the cargo covered by the agreement. This does not mean that a shippers' council should be commodity specific or commodity oriented, though it may be. There is also no requirement that it be trade specific or trade oriented. Nor is there any effort to limit or prescribe the number or types of shippers' councils that may be established. Membership must be voluntary, and any member can act independently on any matter at any time. Processes for consultation and communication with conferences must be included in a shippers' council agreement; this is a reciprocal requirement to section 5(c)(4), (5), and (6).

Subsection (g) recodifies provisions of section 15 of the 1916 Act added recently by the Maritime Labor Agreements Act (Public Law 96–325). It exempts from Federal Maritime Commission jurisdiction all collective bargaining and related agreements except for agreements or arrangements for the funding of collectively bargained fringe benefits on other than a uniform man-hour basis arrived at without regard

to the cargo handled. Consistent with the initial amendments approved in 1980, the remedies applicable to assessment agreements challenged under the Shipping Act, 1916, or this act are limited to "assessment adjustments" which would be "implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, who ha ceased activities subject to the assessment or charge, in which case reparation may be awarded."

Rates, charges, regulations or practices of common carriers which are required to be set forth in tariffs continue to be subject to FMC jurisdiction, regardless of whether those tariff matters arise out of or are otherwise related to a maritime labor agreement. This is intended to preserve the essential principle that a common carrier cannot alter its statutory common carrier obligations at the bargaining table and to sharpen the jurisdictional boundaries between tariffs and agreements, leaving the former clearly within the purview of the shipping laws and relegating the latter (with the exception of assessment agreements) to the labor laws.

Section 6.—Action on agreements

For the first time, agreements may take effect without prior approval. Every agreement shall become effective 45 days after filed under section 5, unless either rejected under section 5 in the first 30 days or suspended from taking effect in the first 45 days. An agreement will be suspended for no more than 180 days only when a complainant meets two tests; this procedure permits agreements that either do not pose a reasonable probability of violating 5 or 12 when implemented or create no substantial injury to the complainant to take effect, while protecting the shipping public from agreements that are noxious on their face. Any person alleging substantial injury to itself may file the complaint. Since all agreements must be published in the Federal Register, a potential complainant has approximately 35 days notice before his right to seek suspension is foreclosed.

At present, if the Commission elects to initiate an investigation into the approvability of a newly filed agreement, it must do so without operational data on the actual impact of the agreement. This lack of data requires the Commission to engage routinely in wide-ranging investigations based on allegations and suspicions which may ultimately prove unsupported. Many of the difficulties of the present procedure relate to the speculative nature of Commission review prior to operational experience under the agreement. After an agreement has been in operation for a period of time, proceedings can focus on evidence of actual events and the shipping public will have assurances that agreements will not be marched through the quagmire of formal hearings on speculative or ephemeral matters. This alternation of current procedures would retain the Commission's ability to fully police concerted activity, while eliminating fruitless and time-consuming regulatory hearings.

The Commission can initiate a hearing and investigation, with or without complaint, whether or not a suspension is sought or granted, and regardless of whether or not the agreement has taken effect, to determine if an agreement violates either sections 5 or 12 and, if so, to cancel or modify it. The Commission, however, is encouraged to order hearings when actual operating experience suggests a violation and not when it habors a vague doubt. All proceedings under this section are limited to 180 days duration and the burden of proof is

clearly placed on opponents. The 180 day time limit is only a maximum time; a final decision can be reached in as short a time as minimal due process requirements permit. It is conceivable, for example, that an agreement that blatantly would operate in violation of section 12 could be cancelled within 45 days of filing and thus never take effect. An agreement that has taken effect, however, remains in effect pending any investigation and hearing.

The Committee is most concerned about the delays resulting from the traditional stages of formal proceedings at the Commission and commends the Commission's effort to reduce or eliminate such delays by modifying procedures where appropriate. The Committee does not believe that full evidentiary hearings are necessary in every case and suggests that hearings include oral testimony and cross-examination only upon a proper showing that there are genuine issues of material fact or the credibility of witnesses that cannot be resolved on the basis of sworn statements, affidavits, interrogatories, admissions, depositions, or other documents or that the nature of the matters in issue is such that oral hearings and cross-examination are necessary for the development of an adequate record. See *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224 (1972).

It is the intent of the Committee to overrule legislatively *Federal Maritime Commission* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968). Neither the burden of proof nor the burden of persuasion shall be shifted solely on the grounds that the agreement would, absent approval, violate the antitrust laws or have significant anticompetitive effects. The burden of proof shall remain throughout the proceedings on the opponents of an agreement.

Overruling *Svenska* is fundamental to the intent of this Bill. The Committee believes that vague standards such as the "public interest" or "detriment to the commerce" tests must be eliminated in order to bring predictability to what has been an unruly regulatory process (in its own right against the public interest and detrimental to the commerce). The entire fabric of this bill promotes these interests by encouraging commercial balance between carriers, shippers, and others, and by prescribing stiff sanctions for specifically prohibited noxious activities. The Committee wishes to provide no opportunity for the reinfusion of antitrust principles into the agreement review process The competitive impact of an agreement upon parties to it is not a concern and other effects are a concern only to the extent an objector carries its burden of proof that a specific prohibition has been violated.

If the Commission finds that willful delays of a party have made it impossible for the Commission to conclude any proceeding within 180 days, then the Commission may cancel the agreement or dismiss the proceeding solely on the basis of the delay. Failure of an agreement's proponent to comply with lawfully issued subpenas or discovery orders in a proceeding is also grounds for cancellation.

The Commission shall not on its own initiative limit the effectiveness of an agreement to a fixed term. At present, some agreements are limited by the Commission to a fixed period of time. In such cases, members of an agreement on the basis of actual experience during the term of approval. It is possible for an agreement to lapse pending a hearing regarding its extension. The Committee believes that members of an agreement should be able to make business decisions with the knowledge that their agreement will continue for an unlimited term, absent actual findings conduct which violates section 12. The increased emphasis placed on Commission surveillance of operating agreements

should ensure that appropriate action can be taken if changing trade conditions cause an agreement to operate in violation of the bill.

In summary, this section expedites and simplifies the agreement implementation process. Agreements may be modified or cancelled only if they violate specific prohibited acts. They are not to be judged by broad public interest standards or the policy objectives of this bill.

Section 7.—Loyalty contracts

This section allows any conference or ocean common carrier engaged in foreign commerce to utilize loyalty contracts. These are contracts in which shippers agree to use the services of the members of a conference, and in return for such patronage, the shipper receives services at rates below those who do not sign such contracts. Shippers and carriers each have the right to seek loyalty arrangements tailored to commodity and geographic needs and capabilities. This section is modeled on the "dual rate contract" authority of section 14b of the 1916 Act, though, unlike section 14b, this section does not require approval by the Comimssion prior to use of a loyalty contract. The thrust of section 7 is that so long as a loyalty contract meets the specific requirements it is lawful and may be used, although filing of sample loyalty contracts is required by section 9. Loyalty contracts are exempted from the antitrust laws by section 8.

While the language of section 7 generally tracks that of section 14b of the Shipping Act, 1916, there are several significant changes.

Section 7(a) specifically authorizes the use of loyalty contracts for through transportation service. Where the contract is effective for through transportation movements, however, the carrier or conference must also provide the contract shipper with the option of contract service for shipments received at the port (that is, for just the ocean portion of the movement). Use of contract service either for the through movement or from the port will satisfy the contract shipper's obligation.

Section 7(a)(2) waives the shipper's loyalty obligation when the carrier cannot provide sufficient space of the type that is suited to the shippers' purposes: it is intended to recognize, for example, the difference between LASH, break-bulk, and container space.

Section 7(a)(3) modifies the requirement that contract rates may be increased only on 90 days notice in two ways. A shipper may agree to less notice, or, if the rate has been reduced within 180 days, an increase may be imposed on 30 days notice if it does not exceed the pre-reduction level.

Section 7(a)(4) places a modest burden of proof on the contract shipper when a dispute arises concerning whether the shipper divested his legal right to select a carrier with the sole intent of avoiding his loyalty contract obligations.

Under section 7(a)(5) the contract shipper has the right to use competing services of ports outside the geographic range served by the conference without being in breach.

Section 7(a)(8) allows greater flexibility by authorizing more than one level of discount between ordinary rates and the contract rates. A carrier could, for example, offer a discount rate for contracts where the export shipper is a signatory and a larger discount where both the export shipper and the consignee are contract signatories.

Section 7(a)(9) exempts not only bulk cargo, but also forest products in an unfinished or semifinished state.

The use of a loyalty contract that does not conform to the requirements of section 7 is a violation exclusively of this bill.

Section 8.—Exemption from antitrust laws

Section 8 extends a "blanket" antitrust immunity to agreements of ocean common carriers, to agreements of marine terminal operators, to shippers' councils, to loyalty contracts, and to other activities regulated under provisions of the bill. This immunity is granted by statute, and is not also conditional upon affirmative approval action of the Federal Maritime Commission, as is the case under the 1916 Act. By operation of section 8, this proposed Shipping Act is made the sole governing law over the regulated ocean transportation activities of common carriers, conferences, marine terminal operators, and shippers' councils operating in the U.S. foreign commerce. The intent is to resolve conflicts between the Shipping Act and the antitrust laws in the maritime sector in favor of Shipping Act jurisdiction. Only the standards, remedies and penalties of this legislation will apply. Carriers operating in the U.S. foreign commerce will no longer face a dual risk of being regulated under both the Shipping Act and the antitrust laws for their conference activities. This is intended to be a broad exemption from the antitrust laws for the activities outlined therein. If such activities are engaged in without Commission approval or in violation of this bill, they are to be subject to the penalties prescribed in this bill, not to the antitrust laws. Thus the Committee intends directly to overrule *Carnation Co.* v. *Pacific Westbound Conference* (383 U.S. 213 (1966)) and *Sabre Shipping Corp.* v. *American President Lines* (285 F.Supp. 949 (S.D.N.Y. 1968), *aff'd sub nom. Japan Line, Ltd.* v. *Sabre Shipping Corp.*, 407 F.2d 173 (2d Cir.) cert. denied 395 U.S. 922 (1969). The antitrust exemption is also effective even where the Commission has exempted a class of activity from regulation.

In addition, transportation service within or between foreign countries, terminal services in foreign countries, as well as the activities of foreign shippers' councils are exempted from the antitrust laws. This is done in furtherance of the policy objective of the bill to harmonize U.S. shipping regulation more closely with that of our trading partners.

Section 8(b) explicitly states that the antitrust immunity granted by this bill does not extend to air, rail, motor, or water carriers not regulated by it. Immunity is not extended to any discussion between combinations of members of an ocean conference and inland carriers concerning the inland divisions of through rates.

The principal purpose of subsection (b) is to make clear that the bill does not confer antiturst immunity for agreements between an ocean common carrier and groups of inland carriers, or among inland carriers alone, concerning intermodal movements. Obviously, it is necessary that an individual ocean common carrier be able to enter into an agreement with an individual inland common carrier regarding through transportation, and such one-on-one arrangements should, and are intended to be, exempt from the antitrust laws as an activity authorized by section 4(a)(1) of the bill.

It is also a purpose of subsection (b) to withhold antitrust immunity from common carriers that are subject to the bill only with respect to joint discussion or agreement concerning the fixing of the inland divisions of through rates. The word "fixing" is carefully chosen to leave room for general discussions regarding the arrangements with inland

carriers that each individual ocean carrier has separately negotiated. Obviously, once the inland division of a through rate has been established between an individual ocean common carrier, a conference of which the latter is a member must be able to take into account the various inland divisions in collectively setting the conference through rate (an activity expressly authorized by section 4(a)(1) of this bill).

Section 9.—Tariffs

This section, based on section 18(b) of the 1916 Act, requires that all "common carriers" including both vessel operators and non-vessel operators, and every conference must publish and file their tariffs with the Commission for port-to-port ocean transportation service and for through transportation service, including intermodal movements of cargo. With regard to intermodal transportation service, the common carrier subject to this bill shall not reveal in its tariff the inland rate divisions of a joint through rate. This prohibition preserves recently enacted deregulatory changes enacted recently affecting inland modes of transportation within the United States. In addition to bulk cargo, forest products in an unfinished or simifinished state are commodities that are exempted from the tariff filing requirements of this section. Further, nothing in this section or this bill is intended to change current government rules and practices for the carriage of government cargoes, and rates for such transportation are not subject to regulation by any conference or other concerted activity except to the extent permitted by the United States Government.

This section generally continues the requirements of section 18(b) of the 1916 Act regarding the material that a carrier must include in its tariffs. The specific statutory requirement that marine terminal operators file tariffs is new, though terminal tariffs have been filed previously with the FMC in accordance with regulations issued by the Commission under section 17 of the Shipping Act. This tariff filing requirement is not intended to expand the coverage of the existing regulations and, therefore, does not place any additional regulatory requirements on terminal operators.

Specific statutory authority for the use of time/volume rates is provided under this section, as well as specific authority for vessel-operating common carriers to enter into service contracts with individual shippers. Time/volume rates must appear in a carriers tariff. They may also be offered in conjunction with a service contract but need not be so connected.

While service contracts between shippers and carriers have not been unknown in the U.S. foreign commerce, there has not previously been specific statutory authority for such contracts. A "service contract" is, by definition, an undertaking between a shipper and a carrier or conference that involves consideration and obligations different than those applicable when business is transacted under a general common carrier tariff, or under a loyalty contract, or simple time-volume rate arrangement. To aid the Commission in enforcing the requirements of this bill, section 9(c) requires that the entire contract must be filed with the Commission, though that document shall remain confidential. For public information, however, all "essential terms," as specifically enumerated, shall be published and filed in tariffs to ensure that such essential terms shall be available to all shippers similarly situated. This objective is consistent with the rationale for tariff publication and, accordingly, the essential terms must be stated with sufficient specificity to serve that purpose.

Reference is made in paragraph (1) to disclosure of "port ranges" for port-to-port movements, and of "geographic areas" for through intermodal movements. Service contracts may—and in many if not most cases will—cover port-to-point or point-to-port movements. In such cases, it is intended that the appropriate term applicable to the respective origin or destination of contract shipments shall govern the necessary disclosure with respect to such movements.

The term "port range" is intended to encompass those ports in the country of loading or unloading of the contract cargo that are regularly served by the contracting carrier or conference, as specified in the tariff applicable to the service in which the contract is to be employed, even if the contract itself contemplates use of but a single port within that range.

The term "geographic area" is intended to identify the general location from which or to which the contract cargo would be moving in intermodal service. Obviously, the scope of this term will necessarily vary from country to country, depending on its size. For Iceland, for example, identifying the country itself may suffice. However, with larger countries, reference to a particular geographic subdivision will usually be necessary in order to satisfy the requirement of commercially meaningful disclosure. Whether identification of a city, county, state (or their equivalent) or a broader geographic region within a given country will suffice for this purpose should, in the Committee's view, be left to a determination in the marketplace by the parties themselves, guided by the underlying legislative intent of the disclosure requirement. If that intent is not adequately implemented in a publication of this, or any other, "essential term" of a particular contract, an aggrieved party may always seek redress before the FMC under Section 13 of the bill.

The "line-haul rate," referred to in paragraph (4) includes all compensation to be paid and must also be disclosed. Many service contracts may provide for charges or allowances for transporting and handling the goods involved that may be different from those published in the otherwise applicable general tariff and, accordingly, any such variance must be identified in the line-haul rate disclosure. To the extent any contract charge or allowance is the same as that in the carrier's or conference's general public tariff, incorporation by reference will suffice.

Paragraph (3) refers to the minimum volume of cargo to be shipped at the line-haul rate specified in paragraph (4). Read together, this means that if there are "staged" volumes and rates in the contract—for example, different rates applicable to different quantities of cargo—each minimum volume and each related line-haul rate is an essential term of the contract. Again, the legislative intent is to provide meaningful commercial disclosure so that interested parties can have access to the facts necessary for intelligent evaluation of the competitive significance of a service contract.

Paragraph (6) requires disclosure of the service commitments in a contract. This goes to the very essence of a service contract, embodying undertakings and obligations above and beyond those involved when business is transacted under the otherwise applicable general common carrier tariff. It should be emphasized that a loyalty contract or a time-volume rate arrangement, each separately authorized elsewhere in the bill, are not service contracts within the intended meaning of that term unless accompanied by a bona fide special service

commitment by the contracting carrier or conference that deviates from its general tariff obligation.

In summary, the disclosure reflected in each specified "essential term" of a "service contract" must be at least the minimum necessary, when read in context with each other, to inform other shippers of rates and services available to them. Reference to "essential terms" is not intended to incorporate the present or future scope of that term as used in the Staggers Rail Act and no other terms in the contract than those enumerated in section 9(c) need be made public. The parties are of course free to publish additional or more informative details or, indeed, the entire contract if they wish to do so. Nor does the list of "essential terms" imply that a contract must contain each such term to be considered a service contract; it merely means that, to the extent that such terms are included in the contract, they must be made public.

Though section 9(c) authorizes "any ocean common carrier or conference" to enter service contracts it does not also grant a right of independent action to conference members. Non-conference carriers may enter service contracts; conferences or other authorized collective carrier entities may enter service contracts; and individual conference members may enter service contracts when consistent with their obligations under their conference agreement. A conference, thus, may preclude its members from entering service contracts individually or may prescribe criteria and conference review as prerequisites for such individual activity, consistent with other requirements of this Bill. Service terms not required to be filed in tariffs are not reachable by the independent action granted in section 5(d).

When a shipper has signed both a conference loyalty contract and a service contract with that conference or one of its members, the service contract would take precedence in the event of a conflict in terms. Nothing in section 9(c) alters the ocean common carrier's obligations not to unjustly discriminate among shippers in offering and providing services.

The notice requirements for the filing of new, increased or decreased rates and the special permission authority of the Commission are the same as that contained in section 18(b) of the Shipping Act, 1916. The refund or waiver provision of section 18(b)(3) of the 1916 Act is also continued with a single exception—refund or waiver applications may be made by shippers as well as carriers.

Section 10.—Controlled carriers

Section 10 carries forward without substantive change the provisions of section 18(c) of the Shipping Act, 1916 (P.L. 95–483).

Section 11.—Ocean freight forwarders

This section replaces section 44 of the 1916 Act and requires ocean freight forwarders to be licensed and bonded by the Commission. An exception is permitted to any person whose primary business is the sale of merchandise and who is involved in the shipment of such merchandise for his own account. The requirement that one be qualified by experience and character to render forwarding services is a modification of the existing standard and is meant to be liberal so as not to pose an unreasonable restraint on entry to the business. The bill effects no change in the procedures for considering license applica-

tions or alleged violations. Revocation of a license for failure to maintain an adequate bond would not require a hearing.

No compensation shall be paid to or received by any person until there is written certification by that person to the ocean common carrier that such person is licensed by the Commission and has performed the statutorily-required services. Ocean common carriers are prohibited from paying for these services more than once on the same shipment.

This section also permanently adopts the temporary amendments enacted in section 1608 of the Omnibus Budget Reconciliation Act of 1981 (Public Law 97–35) to eliminate the "no beneficial interest rule" that has prevailed since 1961. Ocean freight forwarders no longer would be prohibited from being affiliated or connected with a shipper, consignee, or any other person having a beneficial interest in any shipments to foreign countries: however, the forwarder could not receive compensation from a carrier with respect to any shipment in which the forwarder does have a direct or indirect beneficial interest.

The shipper connection prohibition in the Shipping Act prior to Public Law 97–35 was unnecessary and overly restrictive. As a practical matter, its major impact had been to reduce competition by limiting entry into the industry. The elimination of the prohibition benefits both shippers and the forwarding industry. Moreover, the concerns that lead to the original insertion of the prohibition in the Shipping Act are satisfied by the restriction on a forwarder receiving compensation from a carrier with respect to a shipment in which it or any related company has a beneficial interest. This restriction effectively prevents the "dummy forwarder" scheme in which a forwarder is established by a shipper for the purpose of passing through rebates from carriers. At the same time, this provision permits freight forwarders with international trade expertise to participate in export trading companies, as is allowed elsewhere in the world, in the event that Congress enacts the pending Export Trading Company bill (S. 144).

The present bill also repeals subsection (c) of section 1608 of the Budget Act. That subsection provides that the changes made to this area of freight forwarder law would terminate after December 31, 1983. As is made clear in the conference report accompanying the Budget Act, however, the inclusion of the sunset provision was not meant to imply that the changes would not be permanent but rather was intended merely to allow for a test period during which the Commission could evaluate the impact of the changes on the industry. Since the present bill represents a comprehensive recodification of the regulation of international liner shipping in the U.S. foreign commerce, including the regulation of ocean freight forwarding, it is appropriate to consider this subject now . Moreover, experience to date under the Budget Act changes has not revealed any problems with the removal of the shipper connection prohibition. Retention of a sunset provision would only act to dissuade the type of forwarder-shipper arrangements that the section seeks to permit, because none would wish to rely on such tenuous authority. Nevertheless, this section does retain the requirement that the Commission report to Congress by June 1, 1983 evaluating the enforceability of the prohibition against a forwarder receiving compensation from a carrier with respect to a shipment in which the forwarder has a beneficial interest.

The requirement that a forwarder certify that it has performed two out of five listed services as a prerequisite for receipt of compensation has been deleted.

Section 12.—Prohibited acts

This section draws together in one section most of the prohibited acts that were scattered throughout the 1916 Act. It also adds several new prohibited acts in lieu of the vague standards now used in approving agreements under section 15 of the 1916 Act.

Any violation of section 12 may be grounds for suspension, modification, or cancellation of an agreement under section 6. A violation also incurs a civil penalty under section 15. It may also be grounds for reparations to cover actual injury to private parties under section 13. Violation of the anti-rebating provisions provides grounds in addition for tariff suspension under section 15.

The Committee strongly believes that the list of acts prohibited by section 12 with the other requirements of this bill will be sufficient to restrain abuses of concerted power and to protect shippers, ports, nonconference carriers, and others. Specifically prohibited acts should better inform those acting under the authority of this bill of the limits on their activity and the obligations expected of them. Certain types of conduct previously held to be procluded under the "public interest" or "detriment to the commerce" standards of section 15 of the 1916 Act have been specifically prohibited in section 12; this is the case with paragraphs (7), (9), (10), and (11) of subsection (a). In addition, the unjust discrimination language of paragraph (6) has been expanded from its antecedent, section 14 Fourth of the 1916 Act, to include some additional protection previously provided by the unjust discrimination standard of section 15 of the 1916 Act. The Committee believes firmly that the unjust discrimination prohibition of paragraph (6) and the predatory practices prohibition of paragraph (7) sufficiently cover the gamut of noxious practices that are of greatest concern. The Committee, however, hopes they will not be read so broadly that they provide a basis for fishing expeditions or harassment that defeat other objectives of the bill.

Section 12 (a) (1), (2), and (3) derive from section 18(b) (3) of the 1916 Act.

Section 12(a) (4) derives from section 16 Second of the 1916 Act.

Section 12(a) (5) derives from section 14 Third of the 1916 Act.

Section 12(a) (6) substantially revises the provisions of section 14 Fourth. It also carries forward to a limited extent the existing prohibition of section 15 against unfair or unjustly discriminatory agreements. Section 12(a) (6) prohibits common carriers from engaging in "any unfair or unjustly discriminatory practices" against any shipper or port in the matter of (A) rates or charges, (B) service, (C) access to cargo, or (D) the adjustment and settlement of claims." This is considerably broader than section 14 Fourth of the 1916 Act.

Because section 12(a)6) protects shippers or ports only, it is not as broad as the unjustly discriminatory standard currently found in section 15 of the 1916 Act. For example, it is not aimed at preventing unjust discrimination among carriers within a conference. The Commission, in the past, has found that cargo revenue pools which unfairly allocate shares as between member lines are contrary to the unjustly discriminatory standard of section 15. For example, see *Nopal Line* v. *Moore-McCormack Lines, Inc.* 8 F.M.C. 213 (1964). Under the bill an agreement which provides for an unjustly discriminatory or unfair allocation of pool shares between member lines would not be unlawful. The term "exporters and importers," now contained in section 15 of the 1916 Act, is encompassed by the term "shipper." Similarly, the term "shipper" is broad enough that section 12(a) (6) can reach dis-

crimination between exporters from the United States and their foreign competitors.

The purpose of section 12(a)(6), is to codify the common carrier obligation to treat similarly situated shippers and ports alike. The uniformity of treatment contemplated in this Bill is a relative equality based upon transportation conditions only. It is not intended to prohibit carriers from treating shippers or ports differently when the transportation circumstances surrounding the services are not substantially similar. Nor is it intended that the Commission have the authority to order a carrier or conference to provide service to any point, port, or place. It is basic that dissimilarity of circumstances and transportation conditions may warrant dissimilarity in rates or charges, services, regulation, and practice. This section is not intended, alone or in conjunction with any other act, to equalize opportunity between shippers or ports, but rather to prohibit actions which are shown to be not justified by all relevant transportation conditions. Carriers and shippers should not be required by this subsection to engage in outdated and economically unsound practices; and rates, charges, and services should not be found to be unjustly discriminatory because they result in changes in transportation patterns.

Section 12(a)(7) expands the prohibition found in section 14 Second of the 1916 Act against the use of fighting ships to include any predatory practice intended to eliminate the participation of an independent in the trade. An example of the sort of predatory practice which the section seeks to prohibit may be found in "Rates on U.S. Government Cargoes" 11 F.M.C. 263 (167). There, a conference reduced its rates to a noncompensatory level until Sapphire, an independent carrier, left the trade. The conference then raised its rates to their former levels. The Commission concluded that this action violated section 15 of the Shipping Act, 1916, because it was detrimental to the commerce of the United States. Although the "detrimental to commerce" standard has been deleted from the bill, the predatory practices which the Commission condemned in "Rates on U.S. Government Cargo" remain unlawful under section 12(a)(7). Nevertheless, the Committee recognizes that conferences do not, and should not be required to, set rates in a vacuum; the Committee expects that conferences will consider and analyze the rates and services offered by independent carriers when setting conference rates. While a conference may compete with independent carriers, it may not intentionally drive them out of business using unjustly predatory practices.

Section 12(a)(8), prohibiting the use of deferred rebates, derives from section 14 First of the 1916 Act.

Section 12(a)(9) of the bill would prohibit any unreasonable concerted refusals to deal. An example of a concerted refusal to deal is found in Agreement No. 10294 No. 77–23 (F.M.C. Initial Decision served Dec. 13, 1979). Article 2 of Agreement No. 10294 prohibited any party to the agreement from paying consolidation allowances for shipments consolidated or deconsolidated at places other than deepsea waterfront facilities, notwithstanding anything to the contrary in any tariff or agreement in force. The Administrative Law Judge found that Agreement No. 10294 was a type of group boycott aimed at one segment of the consolidation industry. He concluded that it was disapprovable under the unjustly discriminatory standard of section 15 of the Shipping Act, 1916. Agreement No. 10294 was withdrawn by the parties prior to a Commission decision on exception to the initial decision. It is intended that group boycotts or concerted

refusals to deal which fell within the unjustly discriminatory standard of section 15 of the Shipping Act, 1916, be prohibited under section 12(a)(9) of the bill.

Section 12(a)(10) of the bill prohibits collective action that would stifle the development of transportation innovation which the section seeks to protect. The sort of restriction which the section seeks to prevent is illustrated in the following passage from the Commission's decision in *Japan/Korea Atlantic & Gulf Conference Intermodal Amendment* No. 79–74 (F.M.C., June 17, 1981) at 14 n. 24, 20 S.R.R. 1173, 1181:

> Article 1(b) of Agreement No. 3103–67 allows JKAG members to commence individual interior point services of a type not offered by the Conference only after providing JKAG 120 days advance notice of their decision, whereas section 18(b) of the Shipping Act, 1916 (46 U.S.C. 817(b)) and the Commission's tariff regulations (46 C.F.R. Part 536) allows public tariffs covering new services to become effective 30 days after filing. The Commission has held that any requirement for advance notice to a conference other than customary tariff filing is unreasonable because it hinders the development of intermodal innovations. *American West Africa Freight Conference (Agreement No. 7680–36)*, 18 S.R.R. 339, 342 (1978). The present record includes no information supporting JKAG's assertion that advance notice of member line innovations is necessary to accomplish Agreement No. 3103–67's basic objective of ameliorating excess rate competition. The availability of 120 days advance notice is not necessary to permit the JKAG member lines to freely and thoroughly discuss intermodal proopsals with each other.

The section is not limited to restrictions in intermodalism. It would also reach restrictions on other transportation innovations. Reference to intermodalism is intended to be by way of example. The language of this subsection is broad enough to prevent conferences or other agreements among carriers from becoming vehicles for restricting the development of new progressive services.

Section 12(a)(11) prohibits carriers from agreeing to deny brokerage to ocean freight forwarders or to pay it in an amount less than 1¼ percent of freight charges on any given shipment. This provision removes some considerable confusion in the current rules. The Commission in *Agreements and Practices re Brokerage*, 3 U.S.M.C. 170 (1949) had held that a concerted denial of brokerage was "detrimental to the commerce" under section 15 and, in dictum, suggested that payment of less than 1¼ percent also might be. The Commission later reversed this decision (and *Pacific Coast European Conference Payment of Brokers*, 5 F.M.C. 225 (1957)) in *Freight Forwarder Investigation*, 6 F.M.B. 327 (1961), and concluded that brokerage led to abuses and should be prohibited altogether. Congress, however, concluded in enacting P.L. 87–254 that, contrary to the *Freight Forwarder Investigation* case, carriers should be permitted to pay brokerage to ocean freight forwarders. Though the Commission then attempted to reinstate its conclusions in *Agreements and Practices re Brokerage* and *PCEC Payment of Brokerage*, their order was vacated in *Anglo-Canadian Shipping Company, Ltd.* v. *F.M.C.*, 310 F. 2d 606 (9th Cir., 1962). Section 12(a)(11) will remove the confusion that has persisted since passage of Public Law 87–254.

Section 12(b) prohibits shippers, shippers' councils, ocean freight forwarders and nonvessel-operating common carriers from obtaining or attempting to obtain transportation at rates that are below those in the tariffs on file.

Section 12(c) mandates that no conference, ocean common carrier, shippers' council, shipper, or other person subject to this Bill may operate under agreements that have not taken effect or have been rejected, suspended or disapproved.

Section 12(d) carries forward certain prohibitions from sections 17, 16, and 20 of the 1916 Act.

Section 13.—Complaints

Section 13 generally carries forward the provisions in section 22 of the 1916 Act, pertaining to formal investigations. The period for filing of reparations has been reduced from 2 years to 1 year.

Section 14.—Subpenas and discovery

Section 14 generally carries forward the provisions in section 27 of the 1916 Act, relating to discovery. However, the provisions of section 14 make clear that the Commission's rules on discovery may be applied in all investigations and adjudications under the bill and not simply in investigations involving violations of the bill.

Section 15.—Penalties

This section provides civil penalties not to exceed $5,000 for each violation of the bill unless the violation is willful and knowing, in which case the penalty may not exceed $25,000 for each violation. The amount of the penalty is to be determined by the Commission, with each continuing day of violation constituting a separate offense.

For any violation of the antirebating provisions of section 12, or for failure to supply information ordered to be produced or compelled by subpena under section 14, the Commission may, subject to Presidential disapproval, suspend the carrier's or conference's tariffs. Continued operation, by a carrier, under suspended tariffs makes the carrier subject to civil penalties not in excess of $50,000 per shipment. Where failure to produce documents is based on the defense that a foreign blocking statute prohibits its release, the Commission must immediately notify the Secretary of State, who, in turn, is required to consult with the government of the nation involved to assist the Commission in obtaining the information sought. Subsection (b) basically restates provisions of P.L. 96–25.

This section also provides for review of an order assessing a civil penalty, and provides the manner in which an assessment will be recovered where a person fails to pay a civil penalty. The Commission may compromise, modify, or remit civil penalties.

The section prohibits the use of any criminal conspiracy statute to penalize violations of this bill. In order to assess any penalty under this bill, a formal proceeding must be begun within 5 years from the date when the violation occurred.

Section 16.—Commission orders

Section 16 of the bill carries forward with no substantive change the provisions contained in sections 23, 25, 29, and 30, of the 1916 Act.

Orders of the Commission relating to any violation of this bill shall be made only after opportunity for hearing and upon complaint or on its own motion. The Commission may reverse, suspend, or modify any order and, upon application by any party to a proceeding, may grant

a rehearing. The Commission, any injured parties, or the Attorney General may seek enforcement of nonreparation orders by any United States district court having jurisdiction of the parties.

In the case of violation of any order of the Commission for the payment of reparation, the person to whom such award was made may seek enforcement of such order in any United States district court having jurisdiction of the parties. A petitioner who prevails shall be allowed a reasonable attorney's fee. The order of the Commission shall be prima facie evidence of the facts stated therein.

Any action seeking enforcement of a Commission order must be filed within 1 year from the date of the order.

The Commission is given authority to represent itself in court. At present, the Commission is represented in court by the Antitrust Division of the Justice Department. The position of the Antitrust Division with regard to agreements is often antithetical to the position of the Commission. This section will eliminate the possibility of conflict, which currently may occur. This authority has been granted to other agencies (with or without qualification) such as CAB, CFTC, CPSC, FTC, ICC, ITC, NLRB, OSHA, and SEC.

Finally, the Commission is exempted from filing energy conservation impact statements.

Section 17.—Reports and certificates

Section 17 carries forward without substantive change the provisions of section 21 of the 1916 Act.

Section 18.—Exemptions

This section carries forward the provisions of section 35 of the 1916 Act. It empowers the Commission, prospectively, to exempt any specified activity or class of agreements from any requirements of this bill if the exemption will not substantially impair effective regulation. The section deletes the current requirement that the Commission find, before approving an exemption, that an agreement will not be unjustly discriminatory or detrimental to commerce.

This power is consistent with the objective of this bill to minimize Government intervention in and supervision of international liner shipping whenever not inconsistent with other goals of the bill. This power may also prove useful in the event of conflict of laws where a trading partner also regulates the trade regulated by this bill.

Section 19.—Regulations

This section authorizes the Commission to make such rules and regulations as may be necessary to carry out the provisions of this bill.

Section 20.—Repeals and conforming amendments

This section modifies the Shipping Act, 1916, so that it regulates only domestic offshore liner shipping. All agreements, contracts, modifications, and exemptions previously approved by the Commission continue in force and effect as if approved under the provisions of this bill and all new agreements, contracts, and all modifications to existing, pending, or new contracts or agreements shall be considered under the provisions of this bill.

Section 21.—Effective date

This section makes the bill effective 180 days after enactment, except that section 19, authorizing the Commission to promulgate regulations to effectuate the bill, takes effect upon enactment. In addition,

this section provides that the bill shall not apply to or be enforced in litigation initiated prior to April 1, 1982. The purpose of the latter proviso is to make clear that this bill shall not affect preexisting suits at law in any manner, including the construction of any law applied in any such manner, including the construction of any law applied in any such suit. Litigation commenced after April 1, 1982, would be governed by case-law precedent only to the extent consistent with this bill, if enacted.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

Pursuant to section 20 of S. 1593, as reported, the following amendments take effect 180 days after date of enactment.

Shipping Act, 1916

NEW SECTION 3 OF THAT ACT

Sec. 3. Commencing with the effective date of this section, the provisions of sections 4, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 27, 29, 30, 31, 32, 33, 34, 35, 43, and 44 of this Act shall be deemed to apply only to commerce related to transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States or between places in the same Territory, District, or possession.

SECTION 4 OF THAT ACT

Sec. [3.] *4.* Notwithstanding part III of the Interstate Commerce Act, as amended (49 U.S.C. 901 et seq.), or any other provision of law, rates and charges for the barging and affreighting of containers and containerized cargo by barge between points in the United States, shall be filed solely with the Federal Maritime Commission in accordance with rules and regulations promulgated by the Commission where (a) the cargo is moving between a point in a foreign country or a noncontiguous State, territory, or possession and a point in the United States, (b) the transportation by barge between points in the United States is furnished by a terminal operator as a service substitute in lieu of a direct vessel call by the common carrier by water transporting the containers or containerized cargo under a through bill of lading, (c) such terminal operator is a Pacific Slope State, municipality, or other public body or agency subject to the jurisdiction of the Federal Maritime Commission, and the only one furnishing the particular circumscribed barge service in question as of the date of enactment hereof, and (d) such terminal operator is in compliance with the rules and regulations of the Federal Maritime Commission for the operation of such barge service. The terminal operator providing such services shall be subject to the provisions of the Shipping Act, 1916.

(b) Within one hundred and twenty days after enactment of this Act, the Federal Maritime Commission shall promulgate rules and regulations for the barge operations described in the amendment made

by the first section of this Act. Such rules shall provide that the rates charged shall be based upon factors normally considered by a regular commercial operator in the same service.

SECTION 13 OF THAT ACT

[SEC. 13. That for the purpose of carrying out the provisions of sections five and eleven no liability shall be incurred exceeding a total of $50,000,000 and the Secretary of the Treasury, upon the request of the board, approved by the President, shall from time to time issue and sell or use any of the bonds of the United States now available in the Treasury under the acts of August fifth, nineteen hundred and nine, February fourth, nineteen hundred and ten, and March second, nineteen hundred and eleven, relating to the issue of bonds for the construction of the Panama Canal, to a total amount not to exceed $50,000,000: *Provided*, That any bonds issued and sold or used under the provisions of this section may be made payable at such time within fifty years after issue as the Secretary of the Treasury may fix, instead of fifty years after the date of issue, as prescribed in the act of August fifth, nineteen hundred and nine.

[The proceeds of such bonds and the net proceeds of all sales, charters, and leases of vessels and of sales of stock made by the board, and all other moneys received by it from any source, shall be covered into the Treasury to the credit of the board, and are hereby permanently appropriated for the purpose of carrying out the provisions of sections five and eleven.]

SECTION 14a OF THAT ACT

[SEC. 14a. The commission upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

[(1) Has violated any provision of section 14, or

[(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 14, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

[If the commission determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the board shall thereupon certify such fact to the Secretary of Transportation. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the commission certifies that the violation has ceased or such combination, agreement, or understanding has been terminated.]

SECTION 14b OF THAT ACT

[SEC. 14b. Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter "Commission"), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign com-

merce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contact, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however*, That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however*, That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however*, That upon finding that economic factors so warrant, the Commission may exclude from the contract any commoditiy subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity: *Provided*,

however, That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term "contract shipper" means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section.]

SECTION 18 OF THAT ACT

SEC. 18(a) * * *

[(b)(1) From and after ninety days following enactment hereof every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges. and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor. The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count, or to cargo which is softwood lumber. As used in this paragraph, the term "softwood lumber" means softwood lumber not further manufactured than passing lengthwise through a standard planing machinne and crosscut to length, logs, poles, piling, and ties, including such articles preservatively treated. or bored, or framed, but not including plywood or finished articles knocked down or set up.

[(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective: *Provided*, *however*, That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified. Any changes in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term "tariff"

as used in this paragraph shall include any amendment, supplement or reissue.

[(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs: *Provided, however*, That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such a refund or waiver will not result in discrimination among shippers: *Provided further*, That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further*, That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further*, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

[(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

[(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

[(6) Whoever violates any provision of this section, other than subsection (b)(3) hereof involving rebates or refunds shall be subject to a civil penalty of not more than $5,000 for each day such violation continues.

[(7) Whoever violates subsection (b)(3) hereof by means of rebates or refunds, shall be subject to a civil penalty of not more than $25,000 for each shipment on which a rebate or refund was paid and to suspension by the Commission of any or all tariffs filed by or on behalf of such carrier, or suspension of that carrier's right to utilize any or all tariffs of conferences of which that carrier may be a member, for a period not to exceed twelve months. Any carrier whose tariffs or rights

of use thereof have been suspended pursuant to this paragraph and who accepts cargo for carriage during the suspension period which cargo otherwise would have been governed by the provisions of the suspended tariff(s) shall be subject to a civil penalty of not more than $50,000 for each shipment so accepted.

[For purposes of this subsection and section 22(c) of this Act, a shipment shall mean all of that cargo, the carriage of which is evidenced by a single bill of lading.

[(c)(1) No controlled carrier subject to this Act shall maintain rates or charges in its tariffs filed with the Commission that are below a level which is just and reasonable, nor shall any such carrier establish or maintain unjust or unreasonable classifications, rules, or regulations in such tariffs. An unjust or unreasonable classification, rule, or regulation means one which results or is likely to result in the carriage or handling of cargo at rates or charges which are below a level which is just and reasonable. The Commission may at any time after notice and hearing, disapprove any rates, charges, classifications, rules, or regulations which the controlled carrier has failed to demonstrate to be just and reasonable. In any proceeding under this subsection, the burden of proof shall be on the controlled carrier to demonstrate that its rates, charges, classifications, rules, or regulations are just and reasonable. Rates, charges, classifications, rules, or regulations filed by a controlled carrier which have been rejected, suspended, or disapproved by the Commission are void, and their use is unlawful.

[(2) For the purpose of this subsection, in determining whether rates, charges, classifications, rules, or regulations by a controlled carrier are just and reasonable, the Commission may take into account appropriate factors, including, but not limited to, whether: (i) the rates or charges which have been filed or which would result from the pertinent classifications, rules, or regulations are below a level which is fully compensatory to the controlled carrier based upon that carrier's actual costs or upon its constructive costs, which are hereby defined as the costs of another carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade; (ii) the rates, charges, classifications, rules, or regulations are the same as or similar to those filed or assessed by other carriers in the same trade; (iii) the rates, charges, classifications, rules, or regulations are required to assure movement of particular cargo in the trade; or (iv) the rates, charges, classifications, rules, or regulations are required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports.

[(3) Notwithstanding the provisions of subsection (b)(2) of this section, rates, charges, classifications, rules, or regulations of controlled carriers shall not, without special permission of the Commission, become effective within less than thirty days following the date of filing with the Commission. Following the effective date of this subsection, each controlled carrier shall, upon the request of the Commission, file within twenty days of request, with respect to its existing or proposed rates, charges, classifications, rules, or regulations a statement of justification which sufficiently details the controlled carrier's need and purpose for such rates, charges, classifications, rules, or regulations, upon which the Commission may reasonably base its determination of the lawfulness thereof.

[(4) Whenever the Commission is of the opinion that the rates, charges, classifications, rules, or regulations filed by a controlled car-

rier may be unjust and unreasonable, the Commission may issue an order to the controlled carrier to show cause why such rates, charges, classifications, rules, or regulations should not be disapproved. Pending a determination as to their lawfulness in such a proceeding, the Commission may suspend such rates, charges, classifications, rules, or regulations at any time prior to their effective date. In the case of any rates, charges, classifications, rules, or regulations which have already become effective, the Commission may, upon the issuance of an order to show cause, suspend such rates, charges, classifications, rules, or regulations on not less than sixty days notice to the controlled carrier. No period of suspension hereunder may be greater than one hundred and eighty days. Whenever the Commission has suspended any rates, charges, classifications, rules, or regulations under this provision, the affected carrier may file new rates, charges, classifications, rules, or regulations to take effect immediately during the suspension period in lieu of the suspended rates, charges, classifications, rules, regulations: *Provided, however*, That the Commission may reject such new rates, charges, classifications, rules, or regulations if it is of the opinion that they are unjust and unreasonable.

[(5) Concurrently with the publication thereof, the Commission shall transmit to the President any order of suspension or final order of disapproval of rates, charges, classifications, rules, or regulations of a controlled carrier subject to the provisions of this subsection. Within ten days after the receipt or the effective date of such Commission order, whichever is later, the President may request the Commission in writing to stay the effect of the Commission' order if he finds that such stay is required for reasons of national defense or foreign policy which reasons shall be specified in the report. Notwithstanding any other provision of law, the Commission shall immediately grant such request by the issuance of an order in which the President's request shall be described. During any such stay, the President shall, whenever practicable, attempt to resolve the matter in controversy by negotiation with representatives of the applicable foreign governments.

[(6) The provisions of this subsection shall not apply to: (i) any controlled carrier of a state whose vessels are entitled by a treaty of the United States to receive national or most-favored-nation treatment; (ii) any controlled carrier of a state which, on the effective date of this subsection, has subscribed to the statement of shipping policy contained in note 1 to annex A of the Code of Liberalization of Current Invisible Operations, adopted by the Council of the Organization for Economic Cooperation and Development; (iii) rates, charges, classifications, rules, or regulations of any controlled carrier in any particular trade which are covered by an agreement approved under section 15 of this Act, other than an agreement in which all of the members are controlled carriers not otherwise excluded from the provisions of this subsection; (iv) rates, charges, classifications, rules, or regulations governing the transportation of cargo by a controlled carrier between the country by whose government it is owned or controlled, as defined herein, and the United States, or any of its districts, territories, or possessions; or (v) a trade served exclusively by controlled carriers.]

SECTION 26 OF THAT ACT

[SEC. 26. The Commission shall have power, and it shall be its duty whenever complaint shall be made to it, to investigate the action of any

foreign Government with respect to the privileges afforded and burdens imposed upon vessels of the United States engaged in foreign trade whenever it shall appear that the laws, regulations, or practices of any foreign Government operate in such a manner that vessels of the United States are not accorded equal privileges in foreign trade with vessels of such foreign countries or vessels of other foreign countries, either in trade to or from the ports of such foreign country or in respect of the passage or transportation through such foreign country of passengers or goods intended for shipment or transportation in such vessels of the United States, either to or from ports of such foreign country or to or from ports of other foreign countries. It shall be the duty of the Commission to report the results of its investigation to the President with its recommendations and the President is hereby authorized and empowered to secure by diplomatic action equal privileges for vessels of the United States engaged in such foreign trade. And if by such diplomatic action the President shall be unable to secure such equal privileges then the President shall advise Congress as to the facts and his conclusions by a special message, if deemed important in the public interest, in order that proper action may be taken thereon.]

SECTION 44 OF THAT ACT

[SEC. 44. (a) No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business: *Provided, however*, That a person whose primary business is the sale of merchandise may dispatch shipments of such merchandise without a license.

[(b) A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be, an independent ocean freight forwarder as defined in this Act and is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied. Any independent ocean freight forwarder who, on the effective date of this Act, is carrying on the business of forwarding under a registration number issued by the Commission may continue such business for a period of one hundred and twenty days thereafter without a license, and if application for such license is made within such period, such forwarder may, under such regulations as the Commission shall prescribe, continue such business until otherwise ordered by the Commission.

[(c) The Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders and no such license shall be issued or remain in force unless such forwarder shall have furnished a bond or other security approved by the Commission in such form and amount as in the opinion of the Commission will insure financial responsibility and the supply of the services in accordance with contracts, agreements, or arrangements therefor.

[(d) Licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initia-

tive, after notice and hearing, be suspended or revoked for willful failure to comply with any provision of this Act, or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

[(e) A common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others when, and only when, such person is licensed hereunder and has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, and at least two of the following services:

[(1) The coordination of the movement of the cargo to shipside;

[(2) The preparation and processing of the ocean bill of lading;

[(3) The preparation and processing of dock receipts or delivery orders;

[(4) The preparation and processing of consular documents or export declarations;

[(5) The payment of the ocean freight charges on such shipments:

Provided, however, That where a common carrier by water has paid, or has incurred an obligation to pay, either to an ocean freight broker or freight forwarder, separate compensation for the solicitation or securing of cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, then such carrier shall not be obligated to pay additional compensation for any other forwarding services rendered on the same cargo. Before any such compensation is paid to or received by any person carrying on the business of forwarding, such person shall, if he is qualified under the provisions of this paragraph to receive such compensation, certify in writing to the common carrier by water by which the shipment was dispatched that he is licensed by the Federal Maritime Commission as an independent ocean freight forwarder and that he performed the above specified services with respect to such shipment. Such carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect.]

Merchant Marine Act, 1920

SECTION 20 OF THAT ACT

[Sec. 20. (1) That section 14 of the Shipping Act, 1916, as amended is amended to read as follows: (See: Shipping Act, 1916, sec. 14).

[(2) The Shipping Act, 1916, as amended, is amended by inserting after section 14 a new section to read as follows: (See: Shipping Act, 1916, sec. 14a, supra).]

Merchant Marine Act, 1936

SECTION 212 OF THAT ACT

Sec. 212. The Commission is authorized and directed—

(a)–(d) * * *

[(e) To investigate, under the regulatory powers transferred to it by this Act, any and all discriminatory rates, charges, classifications, and practices whereby exporters and shippers of cargo originating in the United States are required by any common

carrier by water in the foreign trade of the United States to pay a higher rate from any United States port to a foreign port than the rate charged by such carrier on similar cargo from such foreign port to such United States port, and recommend to Congress measures by which such discrimination may be corrected; and]

(f)–(g) * * *

SECTION 214 OF THAT ACT

[SEC. 214. (a) For the purpose of any investigation which, in the opinion of the Commission, is necessary and proper in carrying out the provisions of this Act, any member of the Commission, or any officer or employee thereof designated by it, is empowered to subpena witnesses, administer oaths and affirmations, take evidence, and require the production of any books, papers, or other documents which are relevant or material to the matter under investigation. Such attendance of witnesses and the production of such books, papers, or other documents may be required from any place in the United States or any Territory, district, or possession thereof at any designated place of hearing. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the Courts of the United States.

[(b) Upon failure of any person to obey a subpena issued by the Commission, it may invoke the aid of any District Court of the United States within the jurisdiction in which such person resides or carries on business in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Commission, or member, officer, or employee designated by the Commission, there to produce books, papers, or any other documents, if so ordered, or to give testimony touching the matter under investigation or in question. Any failure to obey such order of the court may be punished by such court as a contempt thereof. Any process in any such case may be served in the judicial district wherein such person resides or wherever he may be found.]

SECTION 810 OF THAT ACT

[SEC. 810. It shall be unlawful for any contractor receiving an operating-differential subsidy under title VI or for any charterer of vessels under title VII of this Act, to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

[No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any dstrict court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.]

THE OMNIBUS BUDGET RECONCILIATION ACT OF 1981

SECTION 1608 OF THAT ACT

SEC. 1608. (a) Section 1 of the Shipping Act, 1916 (39 Stat. 728), as amended (46 U.S.C. 801), is amended by striking at the end thereof the paragraph defining an independent ocean freight forwarder and inserting in lieu thereof the following: "The term 'independent ocean freight forwarder' means a person that is carrying on the business of forwarding for a consideration who is not a shipper, consignee, seller, or purchaser of shipments to foreign countries.".

(b) Section 44 of the Shipping Act, 1916 (75 Stat. 552; 46 U.S.C. 841(b)), is amended by adding at the end thereof the following new subsection:

"(f) A forwarder may not receive compensation from a common carrier with respect to any shipment in which the forwarder has a beneficial interest or with respect to any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of such forwarder has a beneficial interest.".

[(c) This section shall remain in effect until December 31, 1983, after which time the definition in section 1, Shipping Act, 1916, of 'independent ocean freight forwarder' shall read "An 'independent ocean freight forwarder' is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest." By June 1, 1983, the Federal Maritime Commission shall submit a report to Congress evaluating the enforceability of this section and describing any reasons why this section should not be made permanent law.]

ADDITIONAL VIEWS OF MESSRS. CANNON, LONG, HOLLINGS, INOUYE, FORD, EXON, AND HEFLIN

The Ocean Shipping Act of 1982 represents a major step toward restoring the U.S. merchant marine to a position of leadership in the world of ocean shipping, and we would hope Congress will enact it expeditiously.

In addition to restoring the primacy of the shipping laws to our international trades, S. 1593, as reported, streamlines and updates our entire body of law regulating international liner shipping. It relaxes many of the existing restraints in that regulatory scheme and thus should promote efficiency, and, to a greater degree, harmonize our shipping laws with those of our trading partners. It should also further ensure the maintenance of a dependable common carrier service responsive to the needs of the vessel operators, exporters, and importers in the waterborne commerce of the United States.

The heart of S. 1593 is its reaffirmation of the original intention of the Shipping Act, 1916, to immunize certain international shipping activities from the antitrust laws; and its facilitation of FMC approval of agreements for economic cooperation among carriers.

The historical reason for the existence of a regulatory regime in ocean commerce has been to afford protection to shippers, ports and other interests that may be injured by abuses made possible by the concerted activities of carriers. This reason becomes far more important in a system such as that envisioned by S. 1593 where concerted activities are encouraged by a blanket exemption from the antitrust laws, and by placing the burden of proof in any FMC inquiry upon the opponents of such agreements.

While S. 1593 retains most of the protections now afforded by the 1916 act, we feel constrained to express some misgivings that there may be a significant gap in this coverage. Specifically, the provisions in this bill for preventing the effectiveness of agreements which on their face violate the Shipping Act may possibly prove inadequate to protect the shipping public and other operators.

Unlike existing law, the FMC would be powerless on its own motion to prevent such an agreement from becoming operative. In the interest of streamlining the regulatory process, we agree that the FMC's prior approval authority over agreements should be curtailed. Nevertheless, as a safeguard against the possibility that some carriers may advertently or inadvertently file an agreement which flagrantly violates the act, we believe the FMC should retain some prior approval authority.

It may not be sufficient in these cases to rely on the complaints of injured parties, as S. 1593 does, before the FMC can act.

In order for such a system to be effective, all potential complainants must first have notice that the agreement has been filed. Since we are not willing to assume that all maritime interests, particularly shippers, follow the Federal Register religiously, we are not confident that all such interests will have actual notice of agreements which may be harmful to them before the agreements become effective.

Second, we are concerned that in some instances, an agreement will be unopposed by a private party for fear of retaliation. For example, many foreign governments control the berths used by ocean carriers in their ports and could easily make the availability of those berths dependent upon a U.S. carrier's willingness to accede to an agreement among the carriers of that foreign country. There have also been documented instances in which a carrier has signed an agreement and later protested its particular terms in an FMC-instituted proceeding. To have refused to sign the agreement or to have attempted to prevent its implementation would likely have resulted in that carrier's total exclusion from the trade.[1]

We also know from our investigation into illegal rebating that parties were hesitant to complain to the FMC about carriers and shippers who were illegally rebating for fear of economic retaliation.[2]

While such instances may not be widespread in our international trades, they have in fact occurred. Inasmuch as the FMC would be immune from economic retaliation, we believe it would have been prudent to retain limited authority in the Commission to prevent, on its own motion and for a limited period of time, agreements from going into effect which on their face violate specific provisions of the act. Our view is further strengthened because, as we have noted, agreements for concerted activities are substantially encouraged, and the probabilities that some of them may on their face violate the prohibited acts section of the legislation (section 12) may be increased, if for no other reason than operators will be motivated to enter into new and innovative types of agreements.

Nor are we completely persuaded that the FMC's authority to cancel agreements on its own motion once they have gone into effect is sufficient. To be effective, this authority depends on the Commission's ability to conduct ongoing surveillance of agreements. This, in turn, is dependent on its resources and initiative, and it appears neither of these commodities have been in abundance in the past.

Finally, the "temporary restraining order" procedure by which the Commission would screen agreements may not afford adequate protection.

Under S. 1593, the only way the effectiveness of an agreement could be stayed would be upon complaint of someone other than the Commission. Before this could occur, however, the FMC would have to find in a preliminary hearing, in which the complainant had the burden of proof, that the complainant had shown a reasonable probability that the agreement will operate in violation of specified provisions of the act; and that within 6 months from the date the agreement was to go into effect, the complainant would be "substantially injured."

A complainant would only have 45 days from the time the agreement was filed, in which to determine if he were "substantially injured", and then get his facts together to show that substantial injury. In practice, however, the period of time would be even less than 45 days because of the delay between filing and publication of the agreement in the Federal Register.

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[1] See e.g. FMC Dk. No. 78–51, Agreement No. 10340—A Cargo Revenue Pooling and Sailing Agreement—Argentina/U.S. Atlantic Trade. 19 SRR 499 (1979); and FMC Dkt. No. 80–45, Agreement Nos. 10386 and 10382—Cargo Revenue Pooling/Equal Access Agreements in the U.S./Argentine Trades. 21 SRR 513 (1982).

[2] See, for example, testimony of then FMC Chairman Karl E. Bakke, hearings before the Subcommittee on Merchant Marine and Tourism, on Illegal Rebating In The U.S. Ocean Commerce, 95th Cong., 1st Sess., p. 8 (1977).

In addition to being substantially injured within 6 months, the complainant would, of course, also have to show a "reasonable probability" that the agreement will operate in such a way as to violate specified sections of the Shipping Act. There is no standard in S. 1593 for determining what constitutes a reasonable probability.

The procedures in S. 1593 which we have discussed are ones of first impression in our regulatory regime. The issues they raise were not considered in the extensive hearings which the Committee held on S. 1593, nor were they addressed in the staff draft of last January which was circulated for public comment. Rather, the focus of testimony at those hearings, and the comments on the draft were on the standards that should be applied by the FMC in exercising prior approval. The novel procedures in S. 1593 were substituted after time for public comment on the staff draft had expired.

We would have preferred a more thorough examination of these issues to assure adequate protection of the interests of U.S.-flag operators, ports, shippers, and others who may be affected by the concerted activities of carriers. Nevertheless, other potential benefits of the bill are such that we are willing to rely upon the apparent lack of opposition to this provision in the interest of passing what we consider necessary and overdue legislation. Accordingly, we do no more here than express our misgivings.

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RUSSELL B. LONG.
ERNEST F. HOLLINGS.
DANIEL K. INOUYE.
WENDELL H. FORD.
J. JAMES EXON.
HOWELL HEFLIN.

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